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Supreme Court of the United States

OCTOBER TERM, 1925

No. 355

GEORGE L. BURROWS, JR., ET AL.,
PLAINTIFFS AND APPELLANTS,
vs.
SAMUEL LORD, ET AL.,
DEFENDANTS AND APPELLEES.

Appeal from the District Court of the United States
For the District of Minnesota

GROUNDS OF JURISDICTION OF COURT AND JUDGMENT TO BE REVIEWED

This is an appeal from a decision rendered by Honorable William A. Cant, United States District Judge for the District of Minnesota, on January 15, 1925, holding the Act in question to be valid and dismissing the bill of complaint (R. 41-51). The jurisdiction of the Federal Court is based upon the ground that the Act assailed

(Chapter 226 of the Laws of Minnesota of 1923) is obnoxious to the equal protection and due process provisions of the Fourteenth Amendment, and violates Section 10, Article 1 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts. It is also based on diversity of citizenship, the amount involved being in excess of $3,000.00. The jurisdiction of this Court is invoked under Section 238 of the Judicial Code.

STATEMENT OF THE CASE

The bill was filed in the United States District Court for the District of Minnesota, in Equity, on March 11, 1924, against Samuel Lord, James G. Armson and Odin Halden, constituting the Minnesota Tax Commission; Clifford L. Hilton, Attorney General of the State of Minnesota, Raymond P. Chase, State Auditor of Minnesota, and Henry Rines, State Treasurer of Minnesota, to restrain and enjoin the defendants from carrying out or enforcing the provisions of Chapter 226 of the Laws of Minnesota of 1923 (Royalty Tax Act), and to have said Act adjudged unconstitutional and void, both under the Federal Constitution and the Constitution of the State of Minnesota. The case came to hearing on pleadings and proofs and on January 15, 1925, the Honorable William A. Cant, United States District Judge for the District of Minnesota, dismissed the bill of complaint and held the Act valid. The appeal is from such decision and brings up for review all questions involved, both local and federal. *(Siler v. Louisville & Nashville R. R. Co., 213 U. S. 175.)*

On October 2, 1899, George L. Burrows (now deceased), of Saginaw, Michigan, and Ezra Rust, then of the City of New York but later on of Saginaw, Michigan, each owned an undivided one-half of the surface rights and an undivided one-third of the mineral rights in a certain mine known as the Rust Mine at Hibbing, Minnesota. Gilbert B. Goff (now deceased), of Edenville, Michigan, owned an undivided one-third interest in the mineral rights of said mine (R. pp. 1, 2, 34). On that date Messrs. Burrows, Rust and Goff leased said mine to the Lake Superior Consolidated Iron Mines, a New Jersey corporation, for the period of fifty years and three months from October 1, 1899, granting unto said lessee the right to explore for, mine, take out and ship merchantable iron ore during the period of said lease. The lessee was required to pay to the lessors for all ore mined and shipped during the first three months of said lease, royalty at the rate of 30 cents for each gross ton, and for all iron ore mined and shipped on and after January 1, 1900, the lessee was required to pay to lessors royalty at the rate of 25 cents for each gross ton. The lease also provided that for all iron ore mined and shipped on and after the first day of January, 1900, the royalties shall be due and payable on the 10th days of April, July, October and January in each calendar year, and that payment on each quarter day shall be for the full amount of ore mined and shipped from the said lands during the three months immediately preceding the first day of the month in which the payment shall become due. The lease required the lessee to pay the lessors a minimum royalty of $50,000.00 each year regardless of whether there were 200,000 gross tons of

ore mined and shipped during the year or not. The lessee was required to pay all taxes and assessments, ordinary and extraordinary, general and special, which may be levied or assessed upon the demised lands and on the iron ore mined thereon, etc., and was required not to permit or suffer said lands and property, or any part thereof, to be sold at any time for any taxes or assessments, and contemplated that the royalties shall be net to the lessors (R. pp. 1, 2, 3, 12, 19, 34). The royalty payments were required to be paid at or to George L. Burrows & Company's bank at Saginaw, Michigan, or at and to any other bank in the City of Saginaw, or elsewhere, as the lessors, their executors, administrators or assigns may from time to time designate in writing (R. 16). It was stipulated that the lessors and their successors have never designated any other place than Saginaw, Michigan, as the place for payment of said royalties and all royalties under said lease have been transmitted by the lessee from Minnesota and received by the plaintiffs at Saginaw, Michigan, as provided in said lease, including those for the year 1923 (R. 34). The royalties were required to be paid by the lessee in gold coin of the United States of the present standard of weight and fineness (R. 16). A copy of the lease is attached to the bill of complaint (R. 12-19).

Mr. Burrows died testate at Saginaw, Michigan, on November 9, 1921, leaving George L. Burrows, Jr., Alice B. Beaumont, Elizabeth B. Huntington, Lucy B. Morley, Mary Sage B. Fowler and Edwina B. Montague as his children and sole heirs at law. Each of said children took an undivided one-sixth interest in his es-

tate under his will. George L. Burrows, Jr., and John W. Beaumont are his executors. His said children and executors are and were during the year 1923 all residents of the State of Michigan. Principal admnistration of his estate was had in Michigan and ancillary administration in Minnesota (R. 1-2-34).

Mr. Rust died testate January 3, 1918. At the time of his death he was a resident of Michigan. Principal administration of his estate was had in the Probate Court of Saginaw County, Michigan, and ancillary administration was had in Minnesota. The interest of his estate in said mine, subject to said lease, belongs to Estelle Rust, James G. MacPherson and Charles J. Reynick, as trustees under said will, and to their successors in trust. The said trustees are now, and were during the year 1923, residents of Michigan (R. 1-2-3-34).

Mr. Goff died September 6, 1911. Prior to his death he had conveyed in trust to his son, Ernest A. Goff, an undivided two-ninths interest in the mineral rights in said mine, subject to said lease, and subsequently his said trustee resigned and the Detroit Trust Company of Detroit, Michigan, was duly appointed trustee in the place of said Ernest A. Goff. The beneficiaries under said trust are all residents of the States of Michigan and California and were such in 1923, and the Detroit Trust Company is a resident of Detroit, Michigan (R. 1-2-3-34).

The lease of October 2, 1899, remains in full force and effect and has never been terminated or modified by the parties thereto. The plaintiffs, as successors in title to an undivided eight-ninths interest in said mineral

lands, subject to said lease, have never canceled, modified or extended said lease or granted any rights in said mineral lands, but merely succeeded to the right of their predecessors in title to receive quarterly in Michigan royalties at the rate of 25 cents per gross ton for all iron ore mined and shipped during the preceding quarter (R. 1-2-3).

The Act assailed in this suit (R. 19-22) was approved April 11, 1923, and purports to take effect and be in force from and after its passage, and is as follows:

"CHAPTER 226—H. F. No. 29

An act providing for the levy and collection of a tax on royalty received by the owner of any right, title or interest in land situate in this state for permission to explore, mine, take out and remove ore from the same.

Be is enacted by the Legislature of the State of Minnesota:

Section 1. Tax on iron ore royalties. Rate. —There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this state, a tax of six (6) per cent.

Sec. 2. Definitions.—For all purposes of this act the word 'royalty' shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state for permission to explore, mine, take out and remove ore therefrom; and the word 'person' shall be construed to include individuals, copartnerships, associations, companies and corporations.

Sec. 3. Annual reports to tax commission.—Every person to whom royalty is paid shall on or before the first day of February, 1924, and annually thereafter on or before the first day of February of each year, make and file with the Minnesota Tax Commission a report verified by the person making the same and setting forth the amount of royalty received by such person during the preceding calendar year, and such other information as said commission may require.

Sec. 4. Contents of reports.—It shall be the duty of every person paying royalty, on or before the first day of February, 1924, and annually thereafter on the first day of February in each year, to make and file with the Minnesota Tax Commission, a report covering the preceding calendar year, verified by the oath of the person making the same and setting forth:

1. The number of tons mined from each tract of land for the right to mine and remove ore on which such person pays royalty.
2. The amount of royalty paid on each tract of land separately.
3. The name and post office address of each person to whom royalty is paid, and
4. Such other information as said commission may require.

Sec. 5. Tax commission to assess tax.—Upon the receipt by the Minnesota Tax Commission of the report provided for in Section 3 of this act it shall determine from such information as it may possess or obtain, whether the same is correct or otherwise, and if found correct, said tax commission shall determine therefrom the amount of tax due from such person, and shall enter the amount thereof in its records and shall make its certificate of taxes due thereon from such person, and on or before the first day of May of each year file the same with the state auditor

and a duplicate thereof with the state treasurer; and the tax commission shall have power, in case it shall deem said report incorrect, to make its findings as to the amount of such taxes due after hearing upon notice to the person interested, and its findings shall have the same effect as the determination of the amount of such taxes upon a report made as hereinbefore provided.

A person subletting land for the use of which he received royalty shall be required to pay taxes only on the difference between the amount of royalty paid by him and the amount received.

Sec. 6. Penalties for non-payment.—If any person subject to the tax provided by this act shall fail to make the report provided for in Section 3 of this act, at the time and in the manner therein provided, there shall accrue upon the tax herein imposed a penalty in an amount equal to ten per cent (10%) of the tax so imposed to be added to and collected with such tax. The tax commission shall in such case determine the amount of the ores mined or produced, together with the royalty paid thereon and shall fix the tax due thereon from such person, together with such penalty, upon such information as it may possess or obtain and shall proceed as provided by law when such taxes are determined upon the sworn report of the person receiving such royalty. Such findings shall stand in the place of the report required by this act to be made by such person and shall be in all courts of the state, for all purposes, prima facie evidence of the facts therein stated.

Sec. 7. Date of payment.—Such tax shall be due and payable on the first day of June, 1924, and annually thereafter on the first day of June, and if not paid on or before that date a penalty of ten (10) per cent shall immediately accrue thereon.

Sec. 8. Tax a lien on lands and ore.—The situs of royalty for all purposes of this act shall be in this state; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore, mine, take out and remove ore on which the royalty is paid.

Sec. 9. Auditor to make draft.—On or before the tenth day of June in each year the state auditor shall make his draft upon each person delinquent in the payment of such tax for the amount of taxes and penalty, or penalties, due thereon, and place the same in the hands of the state treasurer for collection.

The draft of the state auditor for the tax and penalties imposed by the foregoing provisions of this act shall be prima facie evidence in any court where proceedings may be brought for its enforcement that the amount therein stated is due the state from the person against whom the same is drawn.

Sec. 10. Treasurer to collect tax.—The state treasurer within ten days after the receipt of the draft mentioned in Section 9 of this act shall notify by mail the taxpayer designated therein of the amount thereof and if not paid within thirty days after presentation shall deliver the same to the attorney general whose duty it shall be to bring an action thereon in the district court of Ramsey County for the amount of such draft, together with interest and costs of the proceedings. Such tax shall draw interest at the rate of one per cent per month, commencing thirty (30) days after the same falls due; and the judgment of the court when so obtained and properly docketed shall be a lien upon all right, title and interest of the taxpayer to the land upon which

such tax is a lien from the time the same is docketed; and said lien shall continue without limitation with interest at the rate of one per cent per month and the said property may be sold in satisfaction of such judgment in the same manner as provided by law for the sale of property upon execution.

Sec. 11. Penalties for false returns.—Any person who for the purpose of evading the payment of the tax herein provided or any part thereof makes any false return or report shall in addition to the tax provided by this act pay a penalty of fifty (50) per cent of the amount of said tax; and any person who shall knowingly make under oath any false report or return required by this act shall be guilty of perjury and upon conviction thereof shall be punished therefor as provided by law.

Sec. 12. Records to be open to inspection of tax commission—Violations and penalties.—All books, waybills, inventories, correspondence and memoranda relating to or used in the transaction of the business of any person paying or receiving royalty on ore mined in this state, shall upon request of the Minnesota Tax Commission be open to its inspection or examination. If any such person shall neglect or refuse on request of the Minnesota Tax Commission access to the papers and books aforesaid, he shall be guilty of a misdemeanor and upon conviction thereof shall be punished therefor as provided by law.

Sec. 13. Taxes to be paid into general revenue fund.—All taxes assessed, levied and collected under the provisions of this act shall be paid into the state treasury and credited to the general revenue fund.

Sec. 14. This act shall take effect and be in force from and after its passage.

Approved April 11, 1923."

It will thus be observed that the statute seeks to impose a tax of 6% "upon all royalty received during each calendar year thereafter (after December 31, 1923), for permission to explore, mine, take out and remove ore from land in this state." Section 2 of the Act seeks to define the word "royalty." Section 3 requires annual reports to the Minnesota Tax Commission from persons to whom royalty is paid. Section 4 requires annual reports to the Minnesota Tax Commission from persons paying royalty. Section 5 requires the Tax Commission to determine the amount of the tax due from such persons and to enter the amount in its records and to make its certificate of taxes due thereon from such person and on or before the first day of May of each year file the same with the State Auditor and a duplicate thereof with the State Treasurer. Section 6 provides a penalty of 10% for failure to make the report provided for in Section 3 of the Act. Section 7 provides that the tax shall be due and payable on the first day of June, 1924, and annually thereafter on the first day of June, and, if not paid on or before that date, a penalty of 10% shall immediately accrue thereon. The law does not provide to whom, in the first instance, the tax shall be paid. Section 8 provides that the situs of royalty for all purposes of this Act shall be in Minnesota, and the tax therein provided for shall be a specific lien from the time the same is due and payable upon the title and interest of the person to whom such royalty is payable, in and to the land. Section 9 provides that on or before the 10th day of June in each year the State Auditor shall make his draft upon each person delinquent in the payment of the tax for the amount of the taxes and penalty or penalties due thereon, and place the same in the hands

of the State Treasurer for collection, etc. Section 10 requires the State Treasurer, within ten days after the receipt of the draft, to notify the taxpayer by mail of the amount thereof and it provides that if the same is not paid within 30 days after presentation, he shall deliver the same to the Attorney General, whose duty it shall be to bring an action thereon in the District Court of Ramsey County for the amount of the draft, together with interest and costs of the proceedings. It also provides that the judgment of the court when so obtained and properly docketed shall be a lien upon all the right, title and interest of the taxpayer to the land upon which the tax is a lien from the time the same is docketed, and that the property may be sold in satisfaction of such judgment in the manner provided by law for the sale of property on execution. Section 11 provides for penalty in case of false returns. Section 12 provides for the inspection of records. Section 13 requires that all taxes under the Act shall be paid into the State Treasury and credited to the general fund. This is the only section which indicates to whom the tax may be paid. The tax is due and payable, under Section 7, on the first day of June in each year and provides a penalty of 10% if not paid on or before that date, but it nowhere states to whom it may be paid prior to the receipt of the draft from the State Treasurer, which draft may not be received by the taxpayer until 20 days after the first day of June.

The tax purports to be imposed upon the act of receiving a certain kind of royalties. It is not imposed upon all royalties which are received, but only upon

those royalties which are received for permission to explore, mine, take out and remove ore from land in Minnesota. This would necessarily exclude royalties received under licenses granted to manufacture or vend a patented article. It would also exclude royalties received on account of copyrighted books, manuscripts, etc. It would also exclude royalties received under leases of all Minnesota lands, excepting ore lands. It was stipulated that the total tonnage of merchantable ore in Minnesota, according to the figures of the Minnesota Tax Commission in 1923, was approximately 1,300,000,000 tons; that a substantial portion of this ore was not under lease (R. 36). The evidence also disclosed that the State of Minnesota owned about 150,000,000 tons of merchantable ore in the state and that a substantial portion of this was under lease on a royalty basis (R. 40). The stipulation also disclosed that there were a number of ore deposits in the state which were not under lease but which were under contract of sale or had been sold outright (R. 36).

There were, during the year 1923, at least four instances in which fee owners other than the plaintiffs operated their own properties and sold the ore produced, without receiving or paying royalties thereon. In the majority of cases mines are operated by lessees, who derive the returns or consideration from the ore produced through mining and selling it, and do not receive any returns through royalties paid to them, and this was true in 1923. The iron ore in the lands of the plaintiffs constitutes the chief value thereof, and in the case of iron ore deposits, as a general rule the entire substantial value thereof consists in the iron ore. During the year 1923 the total amount of royalties received on

iron ore reported to the Minnesota Tax Commission was $16,347,004.22, of which amount approximately $9,538,-157.87 was reported as being received by resident owners and approximately $1,474,150.58 was reported as being received by corporations foreign to the State of Minnesota, the remaining approximately $5,334,701 being reported as received by non-residents of the state. All the known iron mines of the State of Minnesota are in the northern and northeastern part of the state. Many mines have been entirely exhausted, and it is reasonable to expect that others will be exhausted within a comparatively short time after mining operations begin. At various times 243 iron mines have been in operation, of which 45 have been exhausted.

During the year 1923 forty mines of subsidiary companies of a certain corporation were held by them in fee, free from leases, and were not operated. Seven such mines were so held by one of such subsidiaries, which was during said year engaged in mining and is an operating company, and the present intention of said company is to mine said properties and not to lease them. The remaining mines above referred to were, in 1923 and previously, owned in fee by said subsidiary corporations, and prior to 1923 many of such mines were operated by said subsidiary operating company under arrangements between it and said other subsidiary corporations, which arrangements did not in any instance involve the payment of any royalty by said operating subsidiary company to any such owning subsidiary corporations. During 1923 one such mine was operated under such arrangements, and it is the present intention of said corporations to continue said practice

of operating their said mines under the aforesaid arrangements, not involving the payment of royalties.

The State of Minnesota, in December, 1922, had a total of eighty-four mining leases outstanding on a substantial portion of its approximately 150,000,000 tons of merchantable ore. In 1923 the State was paid royalties of approximately $1,955,805.40 on ore owned by it, most of the leases being on a 25-cent royalty basis, and the royalty paid in 1923 represents a tonnage mined on State-owned lands of about 5,000,000 tons for that year. About one-tenth of the known merchantable iron ore of the State belongs to the State of Minnesota. Royalty rates in iron mining leases in Minnesota vary from 12½ cents to $1.25 per ton. It has been the practice in Minnesota for many years to lease real estate and business lots in cities on long-time leases for rentals payable and paid in cash, and this was true during 1923. Upwards of 4,000,000 yards or tons of gravel are used in Minnesota per year, gravel being found in about half of the localities of the State and the greater part of them are leased on a royalty basis, the royalty being from 5 to 25 cents per yard and usually 10 cents per yard or ton, the leases on large gravel pits commonly carrying a minimum payment per year, the method of mining being similar to that of mining ore by open pit operations, there being about 40 large commercial pits in the State. The State itself uses from 500,000 to 1,000,000 tons or yards of gravel per year, about three-fourths of which is leased from private parties upon a royalty basis, and the State holds from 1,500 to 1,800 leases on a royalty basis. The method of operating such gravel pits is substantially the same as that of operating an iron mine where the ore has to be washed. This was true in 1923.

The royalties under these gravel leases are not subject to the Royalty Tax, and no other rents are subject to this Royalty Tax. Forty Minnesota iron mines owned by subsidiary corporations of a certain corporation in fee were held by those corporations free from lease, which mines contained 344,000,000 tons of merchantable ore and which undoubtedly will be mined without payment of royalty (R. 34-41) and (Records pp. 55-56-67-70 in *Royal Mineral Association et al. v. Lord; William E. Boeing et al. v. Lord,* and *Merrimac Mining Co. v. Lord,* which are cases Nos. 388-389-391 on the October term of this court involving many of the questions involved in the case at bar).

Section 1 of Article 9 of the Minnesota Constitution is as follows:

> "The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes, but public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property, and houses of worship, institutions of purely public charity, and public property used exclusively for any public purpose, shall be exempt from taxation, and there may be exempted from taxation personal property not exceeding in value $200, for each household, individual or head of a family, as the legislature may determine: Provided, that the legislature may authorize municipal corporations to levy and collect assessments for local improvements upon property benefited thereby without regard to a cash valuation, and, provided further, that nothing herein contained shall be construed

> to affect, modify or repeal any existing law providing for the taxation of the gross earnings of railroads."

By amendment adopted November 7, 1922, Section 1A was added to Article 9 of the Minnesota Constitution authorizing an Occupation Tax to be laid on the business of mining or producing iron ore or other ores in the State. Said Section 1-A is as follows:

> "Every person, co-partnership, company, joint stock company, corporation, or association however or for whatever purpose organized, engaged in the business of mining or producing iron ore or other ores in this state, shall pay to the state of Minnesota an occupation tax on the valuation of all ores mined or produced, which tax shall be in addition to all other taxes provided by law, said tax to be due and payable from such person, co-partnership, company, joint stock company, corporation, or association however or for whatever purpose organized, on May first of the calendar year next following the mining or producing thereof. The valuation of ore for the purpose of determining the amount of tax to be paid shall be ascertained in the manner and method provided by law. Funds derived from the tax herein provided for shall be apportioned; fifty percent to the State General Revenue Fund, forty percent to the Permanent School Fund and ten percent to the Permanent University Fund. The Legislature shall by law make the necessary provisions for carrying out the provisions of this section."

There is no similar provision contained in the Constitution of Minnesota specifically authorizing the Legislature to impose a tax on royalties derived from the leasing of iron ore or mineral lands.

Section 1993 of the General Statutes of Minnesota of 1923 provides for the classification and assessment of real and personal property as follows:

> "All real and personal property subject to a general property tax, and not subject to any gross earnings or other lieu tax, is hereby classified for purposes of taxation as follows:
>
> *Class 1.* Iron ore whether mined or unmined shall constitute Class One (1) and shall be valued and assessed at fifty (50) percent of its true and full value. If unmined, it shall be assessed with and as a part of the real estate in which it is located, but at the rate aforesaid. The real estate in which iron ore is located, other than the ore, shall be classified and assessed in accordance with the provisions of Classes Three (3) and Four (4) as the case may be. In assessing any tract or lot of real estate in which iron ore is known to exist, the assessable value of the ore exclusive of the land in which it is located and the assessable value of the land exclusive of the ore shall be determined and set down separately, and the aggregate of the two shall be assessed against the tract or lot."

Class 2. This class includes household goods, etc., and provides that they shall be assessed at 25% of their true and full value.

Class 3. This class includes live stock, stocks of merchandise, unplatted real estate, etc., and provides that they shall be assessed at 33⅓% of their true and full value.

Class 3a. This class includes agricultural products in the hands of the producer, etc., and provides that

they shall be assessed at 10% of their true and full value.

Class 4. This class includes all other property including platted real estate, and provides that such property shall be assessed at 40% of its true and full value.

Section 2337 of the General Statutes of Minnesota of 1923 provides for a specific tax on money and credits, including certain shares of stock in corporations, and in lieu of all other taxes on such property. This Statute reads as follows:

> "As used in this Section, the word 'money' means gold and silver coin, treasury notes, bank notes and other forms of currency in common use; and the word 'credits' means and includes every claim and demand for money or other valuable thing, and every annuity or sum of money receivable at stated periods, due or to become due, and all claims and demands secured by deed or mortgage, due or to become due, and all shares of stock in corporations the property of which is not assessed or taxed in this State.
>
> As hereinbefore defined, money and credits are hereby exempt from taxation other than that imposed by this Act and shall hereafter be subject to an annual tax of three (3) mills on each dollar of the fair cash value thereof."

Moneys, annuities, royalities and credits of every kind belonging to inhabitants of Michigan are subject to advalorem or general property taxes under paragraph 4002 of the Compiled Laws of Michigan of 1915, as amended by Act 297 of the Public Acts of Michigan for 1921 and Act 193 of the Public Acts of Michigan for 1925. Said statute is in part as follows:

"For the purposes of taxation, personal property shall include:

1. All moneys;
2. All annuities and royalties;
6. All credits of every kind belonging to inhabitants of this state, whether such indebtedness is due from individuals or from corporations, public or private, and whether such debtors reside within or without the state, except such as are expressly exempted from taxation by law."

ERRORS RELIED ON

The following assigned errors (R. 52-53) are relied on:

1. In dismissing plaintiffs' Bill of Complaint and entering a decree for the defendants.

2. In holding that Chapter 226 of the Laws of Minnesota of 1923 does not violate Section 1 of Article 9 of the Constitution of the State of Minnesota, which requires that taxes shall be uniform upon the same class of subjects.

3. In holding that the tax imposed by said Act is not obnoxious to the Fourteenth Amendment to the Constitution of the United States, securing to all persons within the State the equal protection of the laws.

4. In holding that such tax is not in violation of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall de-

prive any person of property without due process of law.

5. In holding that the tax so imposed does not violate Section 10 of Article 1 of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

6. In holding that iron lands under lease may properly be segregated in a special class and a special and additional tax levied thereon, or on the income or receipts therefrom.

7. In holding that the fact that iron lands are being depleted of their natural wealth, furnished any proper basis for classification under which they may be subjected to special and double taxation.

8. In holding that for the purpose of special taxation, it is proper to classify lands according to the form of contract by which they are disposed of or enjoyed.

9. In failing to hold that the tax so imposed, if a tax upon royalty as such distinct and separate from the land, is void, because it attempts to tax property beyond the jurisdiction of the State.

10. In failing to hold that plaintiffs were entitled to the relief prayed for in their Bill of Complaint, and to enter a decree permanently enjoining the defendants from enforcing the provisions of said Act.

11. In holding that, unless the Act in question is invalid as against the Uniformity clause of the State Constitution with reference to taxation, or as against

the Due Process or Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States, it must stand.

12. In holding in effect that a classification is valid if based on the incidents of the ownership of the property taxed rather than on its characterictics.

13. In holding in effect that an otherwise invalid and unconstitutional Act can be held to be valid because of the existence of a prior Act, (Chapter 223 of Laws of Minnesota of 1921).

14. In holding that the fact that other mining properties, not in process of being mined or depleted, are not taxed under the Act, is not important.

15. In holding that the fact that other wasting properties, such as stone quarries and gravel pits or certain lumber areas are not included in the Act, does not invalidate the classification.

16. In holding that a heavier tax may be levied on ore lands which are being depleted, (or on the income or receipts therefrom) than on other ore lands (or on the income or receipts therefrom), or than on other non-ore lands that are being depleted.

17. In holding that under either the 1921 or the 1923 Acts, the tax might have been levied as an Occupation Tax or Income Tax, or a tax on the land as might best give effect to the legislative will.

18. In failing to hold that if it is a tax against the person or an excise or privilege tax, or a tax on income or gross receipts, it is void as to non-residents.

SUMMARY OF ARGUMENT

Subject Matter of the Tax

The tax is new and has no counterpart in the authorities. It is imposed upon all royalty received for permission to explore, mine, take out and removed ore from land in Minnesota. The Trial Court held it to be a tax upon an interest in land.

Taxing Statutes Strictly Construed

Taxing statutes must be construed strictly against the state and liberally in favor of the taxpayer. The nature of the tax and the subject on which it is laid must first be ascertained in order to determine its validity or invalidity. The Act must be strictly construed against the state and liberally in favor of the taxpayer.

Power of a State to Tax is Limited to Persons, Property and Business Within Its Territorial Jurisdiction

The state has no power or jurisdiction to levy a tax excepting against persons, property or business, and such persons, property or business must be within the territorial jurisdiction of the state.

If It Is a Tax Against the Person, It Is Void As To Non-Residents

A state cannot levy a tax against the person of a non-resident. The subject matter of the tax in such case is outside the jurisdiction of the state.

If It Is An Excise, Business or Privilege Tax, It Is Void Because

(1) There must exist a taxable privilege, and receipt of income or royalities is not a taxable privilege.

(2) The taxable privilege, if any, is not one exercised and enjoyed within the territorial jurisdiction of the State. The only privilege exercised and enjoyed by these non-resident plaintiffs is the receipt, in Michigan, of royalities.

(3) The tax is not levied against the beneficiary of the privilege. These non-resident plaintiffs cannot be taxed for a privilege which they never possessed or enjoyed. Permission to mine and remove ore was never granted by them, nor to them. That privilege is enjoyed solely by the lessee.

If It Is a Tax on Real Estate, It Is Unconstitutional and Void

It is not imposed on all real estate, nor on all real estate containing ore, but only on real estate containing ore which is leased on a royalty basis. The classification is arbitrary and is based on the incidents of ownership and not on the characteristics of the property.

If It Is a Tax on Personal Property, It Is Unconstitutional and Void

Royalties received by residents of Minnesota are taxed under the Minnesota Money and Credits Law, and royalties received by residents of Michigan are taxed under the Advalorem Tax Law of Michigan, and to tax them again would be double taxation. As to these non-resident plaintiffs, the money has an actual and

physical situs beyond the jurisdiction of the State. Money as such is not subject to subclassification, and to tax money or credits as such, limiting the tax to money or credits derived as royalties under mineral leases, would be arbitrary discrimination. The selection would be based upon the incidents of ownership rather than upon the characteristics of the property taxed.

If It Is a Tax on Income or Gross Receipts, It Is Unconstitutional and Void

Regarded as a tax on income or gross receipts, the tax would be unconstitutional and void because it is not general or uniform upon all incomes, but arbitrarily selects one isolated source of income or gross receipts and exempts all others. It would not be laid on income derived by virtue of occupation, but entirely by virtue of the ownership of property and, in view of the Uniformity Clause of the Minnesota Constitution and the Equal Protection Clause of the Federal Constitution, it would be just as inadmissible to place a discriminatory and arbitrary tax upon a single item of income as it would be to place such a discriminatory and arbitrary tax upon the property, real or personal, from which it was derived.

The Act Violates the Due Process Clause and Inherent Limitations on the Power to Tax

The Act violates the Due Process Clause and inherent limitations on the power to tax, in that it seeks to tax persons or property beyond the jurisdiction of the State, and also because it is arbitrary selection and not classification, and also because it amounts to double taxation.

ARGUMENT

Subject matter of the tax:

The tax sought to be imposed under this law has no exact counterpart anywhere in the authorities. In so far as we can discover, neither the Federal Government, nor any of the states, have ever heretofore sought to impose a tax solely on rents or royalties received under a mining lease, or solely on rents or royalties received on any other kind of a specific lease. The tax is also unique in that the law is not entirely clear as to what is the exact subject matter of the tax. If we heed the language of the Act, the tax is imposed "upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this state." The incidence of the tax, therefore, according to the language of the Act, is the receipt by the taxpayer of royalties of a certain kind, viz., those under ore leases. The law seeks to impose the tax on the act of receiving royalties. Counsel for the State, however, in the trial court, took the position that it was not necessary for the State to determine the nature of the tax, or the subject on which it was laid. It was his position that the tax was related to iron ore and was something which inheres in the ore, or in the lands, and that there was an inseparable relation between what is taxed and the ore. He said you might call it a royalty tax, a severance tax, or a production tax, and that it has some of the incidents of an excise tax, or an income tax. He also stated that it was complementary and supplementary to the Occupation

Tax of 1921. The Trial Court (R. 49) holds that, under either the Act of 1921 or the Act of 1923, the tax might have been laid as an Occupation Tax, or as an Income Tax, or as a tax on the land, and that taken literally the Act of 1923 provides for a tax on royalties. Royalties may be a legislative concept rather than a characterization of the property which is the subject matter of the tax. In any event, the Trial Court did not accept what he deemed the literal interpretation of the Act as imposing a tax on royalties. He held it to be a tax upon an interest in land, in the following language (R. 50):

> "Looking through the Act, however, to the real substance thereof, it is essentially a tax upon the interest in the land owned by the person by whom the tax should be paid, and it is so considered in the determination of this case."

Taxing statutes strictly construed:

The rule announced by this court in *United States v. Merriam, 263 U. S. 179; 44 Supreme Court Rep. 69,* is instructive on the question of the construction of a taxing statute. The court said:

> "On behalf of the Government, it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes, the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. * * *

> (Quoting with approval from *Partington v. Attorney General, L. R. 4 H. L. 100);* 'I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient; because as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute."

Counsel for the State, in the Trial Court, urged what he deemed to be an equitable construction of the Act, that is, that it must be construed in connection with, and as supplemental to, the Occupation Tax Law. This likewise was the holding of the Trial Court—(R. 46). This amounts to construing the Act strictly against the taxpayer and liberally in favor of the state. The argument assumes that the court can read something into the Act which is contrary to, or in addition to, the words of the statute. Although the language of the Act imposes the tax on "all royalty received," yet the state argues that it may be construed as a severance tax, meaning a tax on the taking of the ore from the ground, or it may be a production tax, meaning a tax on producing ore, or it may be an excise tax, or tax on privilege, or it may be an income tax, or tax on net or gross

income, or it may be a tax relating to, or inhering in ore, meaning, we presume, a tax on ore after it is removed from the ground and is ready for shipment. We submit that counsel cannot speculate as to the subject matter on which the tax is laid, nor the place where that subject matter is located, nor read into the Act a meaning beyond the words of the statute itself. Neither can the Act be sustained as an indefinite drag-net to bring within its provisions anything which might be deemed to be royalty received. The Act must stand or fall upon its own verbiage. As to non-residents, the subject taxed being royalties received outside of Minnesota, the Act cannot elsewhere determine that what is received outside of the state is in fact received within the state for purposes of taxation. The Act must be strictly construed against the state. The court cannot amend the Act, nor extend its provisions by implication. *United States v. Isham, 84 U. S. 504; Gould v. Gould, 245 U. S. 153; United States v. United Verde Copper Co., 196 U. S. 215; United States v. George, 228 U. S. 22; Disston v. McClain, 77 C. C. A. 342 and 207 U. S. 587; Smietanka v. First Trust and Savings Bank, 257 U. S. 602, 42 Supreme Ct. 223.*

It is apparent, therefore, that the court must construe this Act strictly against the state and liberally in favor of the taxpayer and, with that rule as a guidance, must determine the nature of this tax and the subject on which it is laid, in order to determine its validity or invalidity. This is true because the court must needs determine whether the subject matter of the tax is one upon which any tax can be laid at all and, if so, whether or not such subject matter is within the territorial jurisdiction of the state.

The power of a state to tax is limited to persons, property and business within its territorial jurisdiction:

Cooley on Taxation, Second Edition, page 21, lays down the rule as follows:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, etc."

The same rule was laid down in *Tappan v. Bank, 19 Wallace, 490 at p. 499,* as follows:

> "The power of taxation by any state is limited to persons, property or business within its jurisdiction."

In *Dewey v. Des Moines, 173 U. S. 204,* the rule was laid down thus:

> "The power to tax is, however, limited to persons, property and business within the state, and it cannot reach the person of a non-resident."

In *Union Transit Co. v. Kentucky, 199 U. S. 195,* the rule was laid down as follows:

> "It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power."

The *Transist Company case, supra,* involved the validity of a Kentucky statute which sought to impose a

tax on personal property of persons residing in that state, whether the personal property was located in Kentucky or elsewhere. The Transit Company was domiciled in Kentucky but owned tangible property permanently located in other states. The court held that the Kentucky statute was invalid in so far as it attempted to impose a tax on personal property permanently located in other states.

In *Michigan Central Railroad v. Powers, 201 U. S. 245,* (quoted with approval in *Shaffer v. Carter, 252 U. S. at page 52),* the following rule is laid down:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business."

The case of *Helen C. Frick v. Pennsylvania,* decided by this court June 1, 1925, *45 Supreme Court Rep. 603,* involves the validity of certain provisions of the Pennsylvania Inheritance Tax Law. That law sought to impose a tax on the transfer of personal property from the decedent, whether located in Pennsylvania or elsewhere, and the first question was as to the validity of the law imposing a Pennsylvania transfer tax on tangible personal property located in New York and Massachusetts. On this question, this court said in part:

> "This precise question has not been presented to this court before, but there are many decisions dealing with cognate questions which point the way to its solution.
>
> These decisions show, first, that the exaction by a state of a tax which it is without power to

impose, is the taking of property without due process of law in violation of the Fourteenth Amendment; secondly, that while a state may so shape its tax laws as to reach every object which is under its jurisdiction, it cannot give them any extra-territorial operation; and, thirdly, as respects tangible personal property having an actual situs in a particular state, the power to subject it to state taxation rests exclusively in that state regardless of the domicile of the owner.

The application to the states of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution and, therefore, it is impossible for one state to reach out and tax property in another without violating the Constitution, for, where the power of the one ends, the authority of the other begins.

The Pennsylvania statute is a tax law, not an escheat law. This is made plain by its terms and by the opinion of the state court. The tax which it imposes is not a property tax, but one laid on the transfer of property on the death of the owner. * * * But to impose either tax, the state must have jurisdiction over the thing that is taxed and, to impose either without such jurisdiction, is mere extortion and in contravention of due process of law. Here the tax was imposed on the transfer of tangible personalty having an actual situs in other states—New York and Massachusetts. This property, by reason of its character and situs, was wholly under the jurisdiction of those states and in no way under the jurisdiction of Pennsylvania. True, its owner was domiciled in Pennsylvania, but this neither brought it under the jurisdiction of that state nor subtracted anything from the jurisdiction of New York and Massachusetts."

It, therefore, appears from the foregoing authorities that, unless the subject-matter of this royalty tax is persons, property or business within the territorial jurisdiction of Minnesota, the statute is unconstitutional and void. We will, therefore, consider whether this tax is imposed upon persons or property, or upon business, and whether the subject-matter is within the territorial jurisdiction of Minnesota, and whether it violates the equal protection clause and due process clause, or the uniformity clause and is discriminatory and void.

If it is a tax against the person, it is void as to non-residents:

The plaintiffs in this case are all non-residents of Minnesota. It was admitted by the State on the argument in the Trial Court that if the tax was against the person, or a tax on money after it is received, then the State would have no jurisdiction. The State even went further and admitted that it could not get a personal judgment against a non-resident in a suit to recover the tax, even though it got personal service upon the non-resident within the state. The reason for this rule is that the subject-matter of a tax against the person is the person himself and, if such person is a non-resident, the subject-matter of the tax is not within the jurisdiction of the State.

In the *Des Moines case, supra,* the Supreme Court of the United States held unconstitutional a statute of Iowa which sought to create a personal liability against a non-resident to pay a paving tax assessed against property belonging to such non-resident within the State of Iowa.

In *Re: Maltbie, 223 N. Y. 227 (119 N. E. 389)*, the —court held that a New Jersey corporation, which was doing business in the State of New York, could not be held personally liable for a tax assessed against the capital of a corporation engaged in business in New York. The court also said:

> "The State may provide for the sale of the property upon which the assessment is made, but it cannot, under any guise or pretense, proceed further and impose a personal liability upon a non-resident to pay the assessment or any part of it. To enforce an assessment of such a nature against a non-resident so far as his personal liability is concerned, would amount to the taking of property without due process of law and would be a violation of the Federal Constitution."

In the case of *New York v. McLean, 57 App. Div. 601* (affirmed in *170 N. Y. 374; 63 N. E. 380)*, the Court held that a non-resident owner of stock in a national bank located in New York, was not personally liable for the tax assessed against his shares.

In the case of *Bristol v. Washington County, 177 U. S. 133*, the question was not as to the personal liability of the owner, but as to the liability of her property which was situated in the State, to the tax.

In *Pendleton v. Commonwealth, 110 Va. 229; 65 S. E. 536*, it was said that the State has no jurisdiction to assess a tax as a personal charge against a non-resident.

Shaffer v. Carter, 252 U. S. 58; 40 Supreme Court Rep. 222, relied upon by defendants, was a suit by a resident of Chicago to restrain the State Auditor of Oklahoma and Sheriff of Creek County, Oklahoma, from

levying upon and selling plaintiff's oil and gas property in that State to satisfy a tax assessed against him on account of income which he derived in 1916 from the business of operating such oil and gas wells. The Constitution of Oklahoma expressly authorized an Income Tax Law. The law was general and applied to all incomes, with certain exemptions and deductions. The income derived by Shaffer was from a business conducted in Oklahoma. As to the nature of the liability, this Court, page 59, said:

> "The entire jurisdiction of the state over appellant's property and business and the income that he derived from them—the only jurisdiction that it has sought to assert—is a jurisdiction *in rem*, etc."

In the *Shaffer* case, *supra*, therefore, the tax was levied on account of income derived by the plaintiff from business conducted in Oklahoma. This Court did not hold that the non-resident was personally liable for the tax and the tax was not in fact levied against the person. The jurisdiction asserted was one *in rem* against the property.

Cooley on Taxation, Fourth Edition, at page 220, says:

> "At any event a non-resident cannot be made personally liable for a tax on his property within the state."

The same author, at page 222, says:

> "A state can no more subject to its power a single person or a single article of property whose residence or legal situs is in another state,

> than it can subject all the citizens or all the property of such other state to its power."

We, therefore, submit that if this is a tax against the person it is void as to these non-resident plaintiffs, because the state has no jurisdiction to levy a tax against the person of a non-resident. The subject matter of the tax in such case is outside the jurisdiction of the state.

If this is an excise, business or privilege tax, it is void:

An excise tax or privilege tax is sometimes referred to as a tax upon business and may take the form of an occupation tax, or a tax upon the exercise of some taxable privilege within the state. An excise tax is not a tax upon property. In *Eliasberg Bros. Mercantile Co. v. Grimes, 204 Ala. 492, 11 A. L. R. at page 304,* the Court said:

> "Practically all courts and text-writers are agreed that an excise tax, being a tax on business or occupation, however measured, is not a tax on property."

The Federal Estate Tax is a tax upon the privilege of transferring property from the dead to the living. Most of the state inheritance tax laws are taxes on the privilege of the living receiving inheritances from the dead. The Minnesota Occupation Tax of 1921 was sustained by this Court in *Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 43 Supreme Court Rep. 528,* as a tax upon the occupation of mining ore in the State of Minnesota, the tax being measured by a percentage of the value of the ore mined and produced during the preceding year, less certain deductions. This Court at page 176 said in part as follows:

> "We think the tax in its essence is what the Act calls it—an Occupation Tax. It is not laid on the land containing the ore nor on the ore after removal, but on the business of mining the ore, etc."

The Trial Court held in substance that iron ore or iron ore that was being depleted and transported beyond the limits of the State and lost to the State as a source of substantial revenue, could be separately classified for purposes of taxation. Elsewhere in this brief we argue that, if the basis of the classification is the fact that natural resources are being depleted and removed from the State and will be lost to the State as a source of revenue, as held by the Trial Court, all such natural resources so being depleted and removed must be brought within the class. It would not be within the constitutional powers of a state to make a sub-class of natural resources which are being depleted and removed, and include in such subclass only iron ore, and then make a sub-class of that sub-class and include therein only such iron ore as was being mined under a lease on a royalty basis. Such sub-classification would be clearly predicated on the incidents of ownership or form of disposal and not on the characteristics possessed by the property. The Trial Court (R. 47) held:

> "The basis of classification which may be invoked in support of Chapter 226, is the circumstance or condition that, of necessity, the lands to which the Act applies, in the course of their development as operating mines, are being and will be depleted in value and ultimately will be lost to the State as a source of substantial revenue. This is the underlying consideration. The desire of the Legislature was to reach the inter-

ests involved in property of that class and apply thereto a special tax."

In the foregoing, the Trial Court clearly goes on record as holding that the basis of the classification is the fact that certain natural resources will be depleted in value and ultimately lost to the State as a source of substantial revenue, and that the desire of the Legislature was to reach the interests involved in property, meaning, we presume, a tax against property, to-wit, iron ore that was being depleted and removed from the State. The Trial Court then argues that, having ascertained the class, to-wit, iron ore which is being depleted and removed from the State, the State can apply to such class or sub-class a special tax, and that a portion of this tax may be imposed under the Occupation Tax Law of 1921 and the remaining portion under the Royalty Tax Act of 1923; that the latter Act is complementary and supplementary to the former and taxes the untaxed portion at six percent. The Trial Court (R. 46) held:

> "Without doubt, when the Legislature of 1923 met and considered problems of taxation, it knew of Chapter 223, Laws of 1921. *State v. Klasen, 123 Minn. 382.* That Act was presumably valid. On its face, it pointed to the fact that one of the interests concerned in the mining industry was thereby subjected to a tax of six percent. It also disclosed the fact that in cases where the mine was leased, the other interest, that represented by the person who received royalties, was not subjected to any such burden. The Legislature found this latter class already carved out by the earlier Act. In 1923, the general purpose apparently was to assure the State a return of a full six percent, less certain minor deductions,

on the value of all ore mined and brought to the surface of the earth. And the further general purpose apparently was to adjust this burden equitably as between the two classes of interests concerned in the operation where the mine was being operated by a lessee. One of these classes, represented by the operator, was specified in *Chapter 223, supra,* and the tax burden by that Act was imposed thereon. The other interest, represented by those receiving royalties, was specified in Chapter 226, Laws of 1923, and a tax in a different form was imposed on that class. The latter Act was designed to complement the former, which related to the same general subject matter. In the consideration of this case, it is neither possible, nor proper to divorce entirely the two acts which have been referred to. Either separately, or together, they indicate the policy of the State with reference to the taxation of the interests therein specified."

We submit that this holding of the Trial Court is unsound for the following reasons: (a) If the basis of the classification is the fact that natural resources are being depleted and removed from the State or lost to the State as a source of revenue, then all such natural resources must be brought within the class, and a sub-classification could not be made of iron ore so being depleted and a special tax imposed thereon, while exempting all other natural resources so being depleted and removed from the State; (b) If, however, natural resources so being depleted and removed from the State could be sub-classified and a special tax imposed only on iron ore so being depleted and removed from the State, then it is manifest that a further sub-classification could

not be made of that sub-class and include therein, for the purposes of the Royalty Tax, only such iron ore as is being mined on a royalty basis, while exempting therefrom all other iron ore; (c) While it is true that this Court, in the *Oliver Iron Mining Co. case, supra,* reserved decision on the validity of the Occupation Tax Act as affecting operating fee owners and held the Act valid only in so far as it affected operating lessees, yet the Act purports to impose the occupation tax on all engaged in the business of mining ore. The Royalty Tax Act imposes the tax only on royalties received by lessors or other similar interests. Therefore, the latter Act is not complementary to the former. The identification of the interest taxed under the Occupation Tax Act is based upon the fact that the taxpayer is engaged in the business of mining ore in Minnesota, whether as lessee or as fee owner, whereas, the identification of the interest taxed under the Royalty Tax Act is the fact that the lessor is receiving royalties under a lease. It cannot be successfully argued that the occupation tax reaches a certain part of an identified interest and the Royalty Tax Act reaches the residue of such part, because the identification of the interest taxed under the Occupation Tax Act is based upon the circumstance of the taxpayer being engaged in the business of mining ore, whereas, the basis of the identification of the interest taxed under the Royalty Tax Act is the circumstance of the taxpayer having received royalties under a lease; (d) This Court has already held that the occupation tax is not a tax against property, but a tax imposed upon an occupation, to-wit, the business of mining the ore. If it is argued that the Royalty Tax Act is a

tax imposed upon a part of the same occupation or business of mining ore, then we submit that it cannot be sustained as proper classification, because the taxpayer, under the Royalty Tax Act, is not engaged in any business and is not exercising any taxable privilege within the State of Minnesota, and a tax could not be imposed upon him on account of the business or privilege exercised by his lessee. Furthermore, the business or privilege exercised by the lessee, to-wit, that of mining ore, could not be split up and parceled out and a part of the tax imposed upon the lessee who is solely and exclusively engaged in the business, and a part of the tax imposed upon the lessor who is in no sense engaged in the business; (e) If the Royalty Tax Act is held to be a tax not on business, occupation or privilege, but one levied against property, then clearly the sub-classification would be invalid and the Royalty Tax Act could not be said to be complementary to the Occupation Tax Act. The one Act would not in any sense tax the untaxed portion under the other Act. If the interest taxed under the two Acts is ore being depleted and removed from the State, then the tax would not be uniform upon the same class of subjects, because the subject taxed under the occupation tax is entirely different from the subject taxed under the Royalty Tax Act. The subject taxed under the Occupation Tax Act is the business or occupation of mining iron ore and, if the Royalty Tax Act is a tax imposed upon property, the subject taxed under it would be property and not occupation or business. If it could be successfully argued (which we deny) that these two Acts, when tied together, would not do violence to the uniformity clause, if each tax was imposed upon the

same class of subjects, it manifestly could not be further contended that they would still be valid if one imposed the tax on an occupation or business and the other on property. The Consitution requires uniformity on the same class of subjects.

It is undoubtedly true, as stated in the Occupation Tax case, that the legislature of a State may exercise a wide discretion in selecting the subjects of taxation, particularly as respects occupation taxes. However, aside from the question of improper classification, there are three fundamental requisites to the validity of any excise or privilege tax, as follows:

(1) There must exist a taxable privilege;

(2) The taxable privilege must be one exercised and enjoyed within the territorial jurisdiction of the state;

(3) The tax must be levied against the beneficiary of such priviledge.

We will test this Act by these three standards:

(1) *There must exist a taxable privilege; and receipt of income or royalties is not a taxable privilege.* It will not be seriously controverted that if the tax is one on privilege, there must exist a privilege to be taxed. A privilege cannot exist merely as a legislative conception, but it must exist as a fact, to be taxable, and it must be enjoyed and exercised in order to be taxable. In fact the doctrine of benefits received is the basis of all taxing statutes. If there is no taxable res there obviously can be no tax. The question naturally arises

—what, if any, taxable privilege exists in the case at bar? The law itself does not answer the question. It seeks to impose the tax on royalties received. We submit that the mere receipt of royalties or income from property does not of itself constitute a taxable excise or privilege. In *26 Ruling Case Law, Sec. 209,* at page 236, the author (citing *Pollock v. Farmers' Loan, etc., Co., 157 U. S. 429,* and *Brushaber v. Union Pacific Railroad Co., 240 U. S. 236)* lays down the rule as follows:

> "The mere right to own and hold property cannot be made the subject of excise, and since the right to receive income from property is the chief attribute of ownership, the act or privilege of receiving income from property cannot be made the subject of an excise."

Dawson v. Kentucky Distilleries & Warehouse Co., 255 U. S. 288, 41 Sup. Ct. Rep. 272, involved the constitutionality of an Act passed by the Legislature of Kentucky in 1920. This Act imposed upon every person engaged in the business of manufacturing whiskey or in the business of owning and storing the same in bonded warehouses within the State what was called an "annual license tax" of 50 cents a gallon upon all whiskey either withdrawn from bond, or transferred in bond from Kentucky to a point outside that State. The question was as to whether, as to such, this 50 cents a gallon tax is an occupation tax or is a property tax. This Court held it was a tax on property and not uniform on all property of the same class, and hence was invalid under the State Constitution. In determining the real subject matter on which the tax was laid, the following language of this Court at page 292 is instructive, viz.:

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents and obviously it has none of the ordinary incidents of an occupation tax. * * * But, as stated by the lower court, 'the thing really taxed is the act of the owner in taking his property out of storage into his own possession, absolute or qualified, for the purpose of making some one of the only uses of which it is capable, i. e., consumption, sale or keeping for future consumption or sale. The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right, is to tax the value. To levy a tax by reason of ownership of property is to tax the property.' "

The right to use property in one of the only ways in which it can be used, is essential to the property right itself. The land itself is taxed in the first instance. To paraphrase the language of Justice Brandeis in the *Kentucky* case above cited, the whole value of the land depends upon the owner's right to put the land to the only use of which it is capable, of extracting the ore. To levy a tax by reason of the ownership of the property is to tax the property itself. This, we submit, is what, in the present instance, the tax does. In other words, there is no taxable privilege which can be separated from the right of ownership to the property.

We submit, therefore, that this tax cannot be sustained as an excise, privilege or business tax because of the mere receipt of royalties themselves as income.

(2) *The taxable privilege must be one exercised and enjoyed within the territorial jurisdiction of the state.* The nature of these mining leases and the royalties derived therefrom has been determined by this Court and by the Supreme Court of Minnesota and the Supreme Court of Michigan in various cases, only a few of which it will be necessary to cite. In *State v. Royal Mineral Association, 132 Minn. 232, 156 N. W. 128,* the Supreme Court of Minnesota refused to sustain a tax on royalties as credits. The Court among other things said:

> "Having determined that the unaccrued payments on these leases are rents, the remaining questions are easy of solution. If these amounts are rents, we are unable to distinguish them from any other ground rents. If these rents, while not yet due, are taxable as credits, then all other unaccrued ground rents are so taxable. Unaccrued rents are not personal property. They are incorporeal hereditaments. They are an incident to the reversion and follow the land. * * *
>
> Our conclusion is that unaccrued rents are real estate; that they are taxed under our tax laws by taxation of the real estate and they are not taxed as personal property and are not to be listed or taxed as credits."

The defendants relied upon the following language in the opinion in the Royal Mineral Association case, viz.:

> "It is not controverted that the Legislature could impose a tax upon these rents or royalties in addition to the general tax upon the land."

The authority of the last quoted statement is challenged upon the following grounds, namely: (a) This

ness in Minnesota. They are not exercising any taxable privilege in Minnesota. Their connection with this real estate consists solely in the receipt by them in Michigan of royalties or rents on account of the mining and shipment of ore by the lessee from their lands in Minnesota. We submit that the only privilege exercised and enjoyed by these plaintiffs in connection with these lands (and which is not a taxable privilege) is the receipt in Michigan of these rents or royalties. The Act makes the receipt of these rents or royalties the taxable *res*. Therefore, the act upon which the tax is imposed is an act performed and consummated outside of the territorial jurisdiction of Minnesota. The defendants, however, argued that the law fixes the *situs* of these royalties for the purpose of the act in the State of Minnesota, under Section 8 of the law which provides that "the *situs* of royalty for all purposes of this Act shall be in this State." Defendants rely on *Savings Society v. Multnomah County, 169 U. S. 421*, as sustaining the right of the State to fix the *situs* of property for purposes of taxation. A study of this case will show that it does not sustain the contention. That case involved the validity of a statute of Oregon imposing a tax on mortgages secured by real estate situated within the State of Oregon, whether the mortgage was owned by residents or non-residents. However, under the law of that State, mortgages were deemed and treated as real estate. The property taxed, therefore, had a *situs* within the jurisdiction of the taxing State.

The defendants also cited the case of *Shaffer v. Carter, 252 U. S. 38, supra.* That case involved the validity of the Oklahoma Income Tax Law as applied to the

income derived by a resident of Chicago from his oil business in Oklahoma. The taxpayer was conducting a business in Oklahoma which constituted a taxable privilege and the law was sustained, it being a general Income Tax Law. Defendants also cited the case of *Travis v. Yale and Towne Manufacturing Co., 252 U. S. 60.* That case involved the validity of the New York Income Tax Law and it was held invalid in so far as it discriminated between residents and non-residents in the matter of exemptions. This Court, however, recognized the doctrine that the power to impose the tax against a non-resident taxpayer was based upon income derived from a business, trade, profession or occupation carried on within the State; in other words, income derived from the exercise within the State of a taxable privilege. This Court said:

> "That the State of New York has jurisdiction to impose a tax of this kind upon the incomes of non-residents arising from any business, trade, profession or occupation carried on within its borders, enforcing payment so far as it can by the exercise of a just control over persons and property within the State, etc. * * * is settled by our decision in *Shaffer v. Carter*, this day announced, involving the Income Tax Law of the State of Oklahoma."

After the amendment to the New York Act, eliminating the discrimination, the case went to the Court of Appeals of New York and is reported as *People ex rel Stafford v. Travis, 231 N. Y. 339, 132 N. E. 109,* and was sustained in so far as it imposed an excise tax upon the business carried on in that state. The court among other things said:

"The tax imposed by the Act of 1919 upon and with respect to the net income from every business carried on in this State by persons not residents of the State, is not for the privilege of carrying on a legitimate business within the boundaries of the State, for that is a privilege granted by the Federal Constitution. It is the imposition of a tax upon business done by a non-resident in this State no greater in any respect than the tax imposed upon the conduct of such a business by a resident of the State. It is measured by a percentage of the net income from the business. Such a tax is just and constitutional. The authority of the State to lay a tax is necessarily dependent upon jurisdiction of the subject of the tax. Its jurisdiction as far as it affects the relator, is over the business done by him in this State. * * * As we have already shown, a non-resident has a constitutional right to engage in legitimate business in the State. The tax is not for a privilege already constitutionally provided, but to cast upon non-residents a just proportion of the expenses of protecting residents and non-residents in business in this State. That expense should be borne by the persons enjoying such protection. It is a tax upon business done in this State, first levied in 1920, but measured by the net income of a designated period and notwithstanding its imposition, the relator, as a non-resident, enjoys the same privileges and immunities as residents of the State and his constitutional rights are protected."

The cases cited by the defendants are commented on to show that they are not authority for the doctrine that the State can fix the *situs* of property (for taxation purposes) which may be located outside of the State, and further to show that in each case the actual *situs*

of the thing taxed was within the jurisdiction of the taxing State. The authorities are clear that the State cannot arbitrarily declare that certain property or privileges outside of the State exist within the State for taxing purposes. The State could not impose a tax on real estate located outside of its boundaries. The *Union Transit Company case, supra,* is authority for the rule that the State cannot tax tangible personal property permanently located in other states, even though the statute so declares it taxable. For the same reason it must be apparent that the State could not tax a privilege which was exercised and enjoyed outside of the State. The only privilege which this Act seeks to tax is the receipt of royalties and that act arises outside of the State of Minnesota. The State would have no jurisdiction over the thing that is taxed. This court, in the case of *Frick v. Pennsylvania, supra,* held the Pennsylvania Statute, imposing a tax on the transfer of personal property located in other states, unconstitutional because the State had no jurisdiction over the thing taxed. This court said:

> "The tax which it imposes is not a property tax but one laid on the transfer of property on the death of the owner. This distinction is stressed by counsel for the state. But to impose either tax the state must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere extortion and in contravention of due process of law. Here the tax was imposed on the transfer of tangible personalty having an actual situs in other states—New York and Massachusetts."

The State cannot by legislative fiat declare that the *situs* of an act which is done outside of the State is in

fact within the State. If the State could do that, then it could declare that the *situs* of all real estate located in Wisconsin was, for purposes of taxation, located in Minnesota, or that all tangible personal property located in Wisconsin was, for purposes of taxation, location in Minnesota. The legislative declaration as to *situs* must accord with the facts, otherwise it is abortive. These plaintiffs, in receiving royalties in Michigan, are not exercising any taxable privilege within the State of Minnesota.

(3) The tax must be levied against the beneficiary of such privilege. Assuming (but denying) that there is a taxable privilege exercised in Minnesota, the tax, to be valid, must be levied against the beneficiary of such privilege. These plaintiffs could not be taxed on account of a privilege exercised and enjoyed by their lessee or by other persons. If it is claimed that the making of the lease was a taxable privilege, it may be answered (a) that the Act does not seek to impose a tax on the making of the lease and (b) that the privilege of making the lease was parted with by the predecessors in title of the plaintiffs in 1899 and never was granted or exercised by these plaintiffs, and (c) a retroactive excise tax imposed in 1924 on the making of a lease in 1899 would violate the due process clause and would impair the obligation of contracts in contravention of Section 10 of Article 1 of the Constitution. These plaintiffs never executed a lease of these ore lands. Clearly they could not be taxed on account of a privilege parted with by their predecessors in title upwards of twenty-six years ago. If it is claimed that the permission to mine and remove ore is a taxable

privilege, the answer is (a) that the Act does not purport to impose a tax on such privilege and (b) that this was a privilege which was parted with by plaintiffs' predecessors in title upwards of twenty-six years ago, and is not now and never was enjoyed by these plaintiffs. In any event, these plaintiffs are not the beneficiaries of such privilege. They have no right to mine and remove ore from this land and never had such right, and never granted such right. It would be the taking of property without due process of law, and denying to them the equal protection of the laws to impose a tax on them on account of a privilege which they never possessed and which is enjoyed by their lessee.

If this is a tax on property it is unconstitutional and void:

We will discuss this question under three headings as follows:

(1) As a tax on real estate it is unconstitutional and void;

(2) As a tax on personal property it is unconstitutional and void;

(3) As a tax on income or gross receipts it is unconstitutional and void.

(1) *As a tax on real estate it is unconstitutional and void.* We have already shown that, under the authorities, the interest of these plaintiffs in this mineral land subject to lease is real estate. The defendants in the Trial Court declined to state upon what they claimed the tax was imposed, but they contended that it was

related to iron ore. The Trial Court (R. 50) held that "it is essentially a tax upon the interest in the land owned by the person by whom the tax should be paid and it is so considered in the determination of this case." The tax must be imposed on either persons, property or business, and the subject matter of the tax, whether it be persons, property or business, must be within the territorial jurisdiction of the State. There can be no such a thing as a valid tax unless it is imposed on some one of these three classes of taxable subjects, and it is not valid then, unless the subject matter of the tax is within the territorial jurisdiction of the State. If it is imposed on property, it must be either on real estate or personal property. If this royalty tax is imposed on real estate, then we submit that it is unconstitutional and void because it denies the plaintiffs the equal protection of the laws within the meaning of the Fourteenth Amendment and is not uniform on the same class of subjects within the meaning of the Minnesota Constitution. It appears that mining lands in Minnesota are already overtaxed, because their value for taxation purposes is 50% of the actual value, while the highest valuation of any other property is 40%. In view of the fact that all real estate, including ore lands, is thus taxed under the general tax laws of the State, it would not be competent for the Legislature to impose an additional tax upon certain ore land in the shape of a royalty tax, while exempting all other lands from the tax and also exempting a large portion of the ore lands. Regarded as a tax on real estate, it is void because it is not uniform upon the same class of subjects. It is not levied against all real estate but only an isolated kind of real estate, to-wit, ore lands;

it is not imposed upon all ore lands but only upon those under lease; it is not imposed upon all ore land under lease, but only upon those ore lands under lease where the lessee is operating the mine or paying royalties; it is not imposed upon all ore lands under lease where the lessee is operating or paying royalties, but only upon those ore lands operated under lease where the lessor is not the State. In other words, if this tax is imposed upon ore lands, the basis of the selection is the incidents of its ownership and not the characteristics possessed by the property. Property cannot be classified for purposes of taxation on the incidents of its ownership. *Cooley on Taxation, Fourth Edition, page 718,* says:

> "So property must be classified by the characteristics possessed by it and not by the incidents of its ownership."

See also *Southwestern Bell Telephone Co. v. Middlekamp, 1 Fed. Rep., 2nd Series, 563.*

The classification adopted must be germane to the purpose of the law. *Wagner v. Milwaukee County, 112 Wis. 601, 88 N. W. 577.*

As was stated in *Commonwealth of Pennsylvania v. Alden Coal Co., 251 Pa. 134,* the right of classification is allowed in order to avoid or correct inequalities, never to create them.

In *Southern Railway Company v. Greene, 216 U. S. 412,* the rule was laid down as follows:

> "The inhibition of the amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws, was

> designed to prevent any person or class of persons from being singled out as a subject of discriminating and hostile legislation. * * * Arbitrary selection cannot be justified by calling it classification."

If this is a tax against real estate, it is not only a double tax, but it is a most discriminating and unjust tax. It is double in that the real estate (ore lands) already is burdened with an unjust portion of taxes under the general law, being taxed at a higher rate than any other property in the State; it is discriminatory in that it singles out one isolated group of owners of land and imposes the tax on them while exempting all others. It exempts all agricultural lands; it exempts all residence property; it exempts all business property; it exempts all mining lands, excepting ore lands, and it exempts all ore lands, excepting those under lease on a royalty basis, and it exempts all those under lease on a royalty basis, excepting those which are being operated, or where the lease requires a minimum annual royalty, and it exempts those which are being operated under leases granted by the State. This arbitrary, discriminating classification could not be sustained on any theory. If we regard this as a tax on land, it is difficult to appreciate upon what theory an added tax can be imposed upon ore land and not imposed on other lands, but if it is claimed that the classification might go that far, then it is more difficult to appreciate upon what theory ore lands being mined could be subjected to the tax, while all ore lands not being mined would be exempt. But if it is claimed that the classification might go that far, then it is inconceivable that a further classification might be made so as to impose the tax only on ore lands

operated under lease, while exempting all other ore lands and all other real estate. It is only under leases that royalties are paid. We then reach the point where the classification is based solely on the incidents of ownership rather than on the characteristics possessed by the property. Ore lands being operated possess the same characteristics as ore lands not being operated, and ore lands operated under a lease possess the same characteristics as ore lands being operated by the fee owner. Regarded as a tax on real estate, the incidence of the tax is made to depend solely on whether the ore lands are operated under lease on a royalty basis, or where the lease requires the payment of a minimum annual royalty.

The Trial Court (R. 46-49) argued that practically all of the iron ore that is mined in Minnesota is being transported beyond the limits of the State and that great natural wealth, which serves as the basis of taxation, is annually being withdrawn therefrom, and that of necessity the revenues of the State will be substantially affected thereby. From this he deduces the conclusion that it was the policy of the State to impose an added tax on ore lands because they are being depleted in value and ultimately will be lost to the State as a source of substantial revenue. The Trial Court held that the desire of the Legislature was to reach the interests involved in property of that class and apply thereto a special tax. It seems to us that this reasoning is faulty and unsound for several reasons. Our search of the authorities has failed to reveal a case anywhere in the books where the Courts have justified a classification for purposes of taxation based solely on the ground that

the property taxed was being depleted, removed beyond the limits of the state and would ultimately be lost to the state as a source of revenue. As was held in the *Union Transit case, supra,* some benefit to the property taxed is a controlling consideration in classifying property for taxation. Property that is being depleted or transported beyond the limits of the state does not receive any special benefit not common to all other property. It would be a very dangerous doctrine, indeed, for the courts to declare that an added tax could be imposed on property simply because it was being depleted or being removed beyond the boundaries of the state. The Legislature does not possess an unlimited power to tax, nor unlimited power to classify. *Cooley on Taxation, Fourth Edition, page 396,* says:

> "An unlimited power in the Legislature to make any and everything lawful which it might see fit to call taxation would, when plainly stated, be unlimited power to plunder the citizen."

The classification adopted must be germane to the purposes of the law and must be based on some difference which bears a just and proper relation to the attempted classification.

Wagner v. Milwaukee Co., 112 Wis. 601, 88 N. W. 577.
Commonwealth of Pa. v. Alden Coal Co., 251 Pa. 134, 96 Atl. 246.
Gulf, etc., v. Ellis, 165 U. S. 150.
State v. Parr, 109 Minn. 147, 123 N. W. 408.
State v. Ins. Co., 145 Minn. 231, 176 N. W. 756.

Classifying property by the criterion of whether it is being depleted and removed beyond the limits of the

state, is not classifying it by its characteristics; it is classifying it by its ultimate disposal or destination. If the state has the power to say that certain property shall be subjected to a special and added tax simply because it is being depleted and removed beyond the limits of the state, then, indeed, a new and a dangerous power is recognized in the states. It is new because no justification for it is found anywhere in the cases. It is dangerous because of the hardship and discrimination which may result therefrom, and because it does violence to the doctrine that benefits received must be a controlling consideration in the classification. If the doctrine announced by the Trial Court is sound, then a special tax may be imposed on all agricultural products which are being removed beyond the limits of the state, while exempting all other agricultural products. So also a special tax might be imposed on forest products which are being removed beyond the limits of the state, while exempting all other forest products. So also a special tax might be imposed on any other commodity which was being removed beyond the limits of the state, while exempting all other commodities not so removed. If, however, a classification could be predicated on the fact that commodities were being depleted and removed beyond the limits of the state (which is denied), then manifestly the classification to be valid must be based on all commodities so being depleted and removed beyond the limits of the State; otherwise the classification would be arbitrary discrimination. If depletion and removal from the State is a proper basis of classification, then obviously all taxable property being depleted and removed from the limits of the State must be put within the class. Clearly the basis of the classifi-

cation must be consistent and the classification must include all within the class. It would not be competent for the State to bring within the class certain commodities which are being depleted and removed from the State and exclude all others. If the policy of the State and the purpose of the law is to impose a special and added tax on property because it is being depleted and removed from the State, then that purpose must apply to and comprehend all property within the class. A law which predicates the classification on the fact that the property is being depleted and removed from the State but only brings within the class one isolated kind of property that is so being depleted and removed from the State, while excluding all others, could not be sustained on any theory. It would be arbitrary selection and not proper classification.

Justice Mitchell, in *Johnson v. St. Paul & Duluth Railroad Company, 43 Minn., p. 222,* said:

> "It has been sometimes loosely stated that special legislation is not class, if all persons brought under its influence are treated alike under the same conditions. But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought within its influence, but in its classification it must bring within its influence all who are under the same conditions."

Regarded as a tax on real estate, it is not a tax on all real estate in Minnesota. It is not a tax on all real estate in Minnesota containing iron ore. If it is a tax on real estate, it is only levied on such real estate as contains iron ore where the iron ore is leased on a royalty basis and the mine is being operated or the lessor

is receiving royalties. Section 1993 of the general statutes of Minnesota of 1923 imposes a general property tax on such real estate as contains iron ore. The Royalty Tax Act, therefore, if considered as a real estate tax, attempts to impose a special and additional tax on part only of the real estate containing ore and this without any reference to the characteristics possessed by such property. The imposition of the special tax is made to depend solely on the incidents of ownership, that is, whether the ore land is under a lease on a royalty basis and the lessor is receiving royalties. The statute imposes the special tax on the fruits or proceeds of the ore land if leased on a royalty basis, and exempts such proceeds when the real estate is not leased. It also exempts such proceeds when they are obtained through either a sale of the ore land as such, or a sale of the ore land subject to the lease, or where the ore is mined by the owner of the fee, or where the proceeds are received by the state under a lease of its own lands. The State of Minnesota owns in fee about 150,000,000 tons of ore or upwards of one-tenth of the merchantable ore of the State. This special tax, therefore, is levied not because of any differences in the subject on which it is imposed and similar property on which it is not imposed, but solely because of the difference in the form of the sale or disposal of the ore and, therefore, is a tax not on a class of subjects, but rather on a specific form of disposal of ore. The evidence (R. 36) disclosed that in 1923 there was approximately 1,300,000,000 tons of merchantable ore in place in the State. And that subsidiary corporations of a certain corporation held in fee, and free from lease, 344,000,000 tons of such ore, and this ore will doubtless be mined without the payment of royalties and, therefore, not subject to this special tax.

Therefore, one company and its subsidiaries own in fee, and not subject to lease, approximately one-fourth of the total ore in the State. This will all escape the royalty tax. The Act, therefore, is a clear and hostile discrimination against these plaintiffs whose ore lands were under long-time leases 24 years before the Act took effect.

A law which taxes certain leased mineral lands but exempts all unleased mineral lands and all leased mineral lands where the lessee is not paying royalties, is arbitrary discrimination. Property cannot be so classified for purposes of taxation. Such a classification is based upon incidents of ownership rather than upon differences in characteristics of the taxed and untaxed property. To impose an additional and special tax upon leased ore lands where the lessee is paying royalties is to impose a double tax upon it and renders the taxation not uniform upon the same class of subjects,—there being no difference in the character of the ore lands in the two cases. The leased ore lands require no greater protection from the State, receive no greater benefits from it and there is no reason why they should contribute to its revenue in a greater degree than unleased ore lands from which no royalties are derived.

Congress may pass a valid tax law which is not uniform on the same class of subjects, providing it has territorial uniformity. But a tax law passed by the State, under the equal protection clause of the Fourteenth Amendment and the uniformity clause of the Minnesota Constitution, must be uniform on the same class of subjects. *Knowlton v. Moore, 178 U. S. 41; Flint v. Stone, Tracy Co., 220 U. S. 107.*

The State in the Trial Court relied on *Oliver Iron Mining Co. v. Lord, 262 U. S. 172,* as sustaining the right of classification. This Court there was dealing with an occupation tax and not with a tax on real estate. Therefore, if this royalty tax is regarded as a tax on real estate, it cannot be claimed to be complementary or supplementary to the Occupation Tax Act, and it cannot be claimed that the tax is uniform on the same class of subjects on the theory that the Royalty Tax Act taxes the untaxed portion under the Occupation Tax Act. To have uniformity, both taxes would need to be levied on the same class of subjects. Furthermore, this Court has not yet passed upon the validity of the occupation tax as affecting a fee owner mining his own property. If this Court should ultimately hold the Occupation Tax Act void as to the fee owner mining his own property, then clearly such ore would escape both taxes. There would be no occupation tax imposed upon such fee owner mining his own property because the law as to him is void, and there would be no royalty tax imposed because the ore land was not under lease and no royalties were paid or received.

The cases of *Thompson v. McLeod, 112 Miss. 383, 73 Southern 193, and Thompson v. Kreutzer, 112 Miss. 165, 72 Southern 891,* are instructive on the question of the limitation of the power of a State to impose such a special tax. In the McLeod case the Court held invalid a statute of that State imposing an additional tax of ¼ of 1 cent on each cup or box of turpentine extracted from standing trees. It appeared that the taxpayer who owned his own turpentine distilleries and the trees which produced the resin, paid an *ad valorem* tax upon

the land and standing trees, and also a privilege tax for the right to manufacture or distill spirits of turpentine. The additional tax of ¼ of 1 cent on each box was held to be an additional burden of taxation operating directly upon his property and unconstitutional and void.

We, therefore, submit that, regarded as a tax on real estate, it is unconstitutional and void under both the Federal and State Constitutions because (a) it is not imposed on all real estate; (b) it is not imposed on all real estate containing ore; (c) it is not imposed on all real estate containing ore but only on real estate containing ore which is leased on a royalty basis; (d) it may be imposed on real estate which does not contain ore, providing such real estate is leased on a royalty basis under a minimum clause and is not being operated. The tax in such instance is imposed regardless of whether ore exists. (e) It does not classify real estate by any single characteristics pertaining to lands as such, but purely based on incidents of ownership and, therefore, the tax is not uniform on any class of real estate; (f) it imposes the tax on the proceeds of ore lands when leased but it exempts such proceeds when not leased but obtained through (1) a sale of the fee; (2) a sale of the lease; (3) a mining and sale of the ore by the owner; (4) receipts by the state on a lease of its lands. (g) This special tax, therefore, is imposed not because of any inherent differences in the class of the subjects taxed and those not taxed, but solely because of the form or manner of disposal of the subject, and is a tax not on a class of subjects, but on the form or manner of disposal of one subject, namely, the leasing of ore lands. (h) Regarded as a tax on real estate, it is a clear arbitrary and

hostile discrimination between particular persons and classes.

(2) *As a tax on personal property it is unconstitutional and void.* If this is a tax against personal property it must be a tax either against money and credits, or it must be a tax against the ore after its removal from the ground and before it is shipped out of the State. The defendants admitted in the Trial Court that as against non-resident plaintiffs, it could not be sustained as a tax either against money or against credits. When the tax is imposed the credit has disappeared and has become money in the hands of the lessor outside of the jurisdiction of the State, and no valid personal tax could be imposed against a non-resident plaintiff. Regarded as a tax on money as such, the class is incapable of further subdivision. Money could not be classified for purposes of taxation in such wise as to impose the tax on money in hand derived from a certain source, while exempting from the tax all other money in hand derived from other sources. Any valid tax on money would have to be uniform on all money. It would be arbitrary and unreasonable discrimination to attempt to classify dollars once received according to the source from which they came.

Royalties received by residents of Minnesota are taxed under Section 2337 of the General Statutes of Minnesota of 1923, being the Money and Credits Law, the same as all other money of residents. Royalties received by residents of Michigan are taxed as money or credits as the case may be, under paragraph 4002 of the Compiled Laws of Michigan of 1915 as amended by Act

297 of the Public Acts of Michigan for 1921 and Act 193 of the Public Acts of Michigan for 1925, the same as all other money or credits of residents of Michigan. For Minnesota to again tax such royalties received as money or credits would, as to residents of Minnesota, not only be double taxation but would violate the constitutional requirement of uniformity on the same class of subjects and would, as to residents of Michigan, not only be double taxation and violate the constitutional requirequirement of uniformity on the same class of subjects, but would be a tax beyond the jurisdiction of the State to impose.

The case of *State v. Royal Mineral Association, 132 Minn. 232,* held that, under the Money and Credits Law, the unaccrued royalties not due when the money and credits tax is levied constitute a part of the real estate and the real estate, having once paid the ordinary *ad valorem* tax, is exempted from any further tax such as a tax on money and credits. The same case, however, held that when royalties do mature, they then become personal property and taxable under the Money and Credits Law as such. In the case at bar, the royalties received are not only due and payable but have actually been paid before the tax is imposed. At such time they have become money in the hands of the lessor and in the case of Minnesota residents, are taxed as such money under the Money and Credits Law and, as to residents of Michigan, they are taxed under the Michigan statute referred to imposing an ad valorem tax on all moneys and credits. Therefore, this Royalty Tax Law, as to residents of Minnesota, is unconstitutional under the uniformity clause of the State Constitution and the equal

protection and due process clauses of the Federal Constitution and, as to residents of Michigan, the tax is unconstitutional for the same reasons and for the additional reason that the money is beyond the jurisdiction of the State and is not subject to taxation by Minnesota. Royalties considered as moneys and received by a nonresident outside of the State certainly have their *situs* where received by the creditor. Royalties whose *situs* is beyond the jurisdiction of the State cannot be brought within the State by any mere statutory declaration. A statutory declaration cannot establish a *situs* within the State for property whose actual and legal *situs* is outside of the State. Section 8 of the Royalty Tax Law reads:

> "The situs of royalty for all purposes of this Act shall be in this State."

We submit that this section of the law is abortive and void. The *situs* of such royalties as moneys received, not only legally but physically and actually is outside of the State and at the domicile of the lessor, and the State could no more bring such royalties within the State by legislative declaration than it could bring within the State real estate or tangible personal property for purposes of taxation. The jurisdiction of the State to tax stops at the State boundary. As this Court said in the *Frick case, supra:*

> "It is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of the one ends, the authority of the other begins."

Either the person or the property or business taxed must be within the jurisdiction of the taxing state, otherwise the tax is illegal and void.

We have already shown that, regarded as a tax on credits, the tax would be illegal double taxation because, as to residents of Minnesota, it would already be taxed under the Minnesota Money and Credits Law, and, as to residents of Michigan, it would be taxed under the Michigan Money and Credits Law. We have also shown that when the royalty tax is imposed the credit has disappeared and has become money in the hands of the lessor.

Therefore, regarded as a tax on money or credits, this Act is unconstitutional and void because (a) as a tax on money, the thing taxed not only has a legal but an actual and physical *situs* beyond the jurisdiction of the State; (b) regarded as a tax on money, the classification is arbitrary and illegal because money as such is not subject to sub-classification for purposes of taxation. Either all money must be taxed or none can be taxed. (c) The legislative declaration that the *situs* of royalties received as moneys is within the State is abortive, and the State cannot, by legislative declaration or fiat, bring within the State that which is legally, actually and physically beyond the jurisdiction of the State. (d) Because, regarded as a tax on either money or credits, it would be illegal double taxation,—the money or credits being taxed as such as to residents of Minnesota under the Money and Credits Law of that State and as to residents of Michigan under the Money and Credits Law of Michigan; (e) because as a tax on money or credits as such, the imposition of the tax would be based upon the incidents of ownership or the source from which the money or credit sprang, rather than from its characteristics and hence would be arbitrary discrimination.

It remains, therefore, to be considered whether the tax is imposed on the ore after removal from the ground and before shipment from the State. The Act does not *pro forma* impose the tax on the ore, but the defendants in the Trial Court contended that there is an inseparable relation between what is taxed and the ore. If it is claimed that the tax is on the ore after its removal from the ground, then we submit that the Act is unconstitutional and void because it amounts to a denial of the equal protection of the laws and is not uniform on the same class of subjects. If it is a tax on the ore after removal from the ground, it will be obvious that there will be no legal basis for the classification made by the law. Assuming that there might be brought within the class, ore only, and excluding therefrom all other minerals such as sand, gravel, stone, etc., it would follow that the class could not be further narrowed. The validity of such a law and classification would depend upon all ore removed from the ground being subject to the tax. If this tax is on ore removed from the ground, then it obviously exempts from its burdens all the ore removed by operating fee owners. There would be no basis for a classification which would impose a tax on ore removed by lessees but exempting from the tax ore removed by operating fee owners. If the tax is on ore removed from the ground, then it would be imposed on ore removed by lessees, but would not be imposed on ore removed under contracts of sale, because the payments received under such contracts are not royalties received. There would be no basis for a classification which would impose the tax on ore removed by a lessee while exempting from the tax ore removed by a vendee

under a contract of purchase. If the tax is on ore removed, it would be imposed on ore removed by lessees under leases from private ownership but would not be imposed on ore removed under leases made by the State. There would be no basis for a classification which was based on ore removed under leases from private owners while exempting from the tax all ore removed under leases from the State. The case of *Heisler v. Thomas Colliery Co., 260 U. S. 253, 43 Supreme Court Reports, 84,* relied upon by the defendants, is not authority for the validity of this tax as against ore removed. That case involved the validity of the Act of 1921 of Pennsylvania, which imposed a tax of 1½% on the value of each ton of anthracite coal mined, washed or screened or otherwise prepared for market in the Commonwealth. The tax was not imposed on bituminous coal. The tax was imposed when the coal was ready for shipment or market. This Court sustained the law. The *Heisler* case is an extreme case and no doubt carries the doctrine of classification to the limit. However, in that case it was disclosed that there were a great many differences between the geological formation, chemical context, attributes and uses of anthracite and bituminous coal. This Court said:

> "The differences between them are a just basis for their different classification; and the differences are great and important. They differ even as fuels; they differ fundamentally in other particulars. Anthracite coal has no substantial use beyond a fuel; bituminous coal has other uses. Products of utility are obtained from it. The fact is not denied and the products are enumerated and the extent of their use. They are, therefore, incentives to industries that the State in

> natural policy might well hesitate to obstruct or burden, and to yield to the policy or consider it is well within the concession of the power of the State expressed in the cases we have cited."

The tax, in that case, was imposed upon all anthracite coal mined, washed or screened and ready for shipment or market. An entirely different question would have been before the Court had the tax been imposed only on anthracite coal which was mined under a lease and had the law excluded therefrom all anthracite coal mined by operating fee owners, and had further excluded therefrom all coal mined under contracts of sale of coal in place, and had further excluded therefrom all anthracite coal mined under certain leases, such as State leases, etc. It is inconceivable that if the Pennsylvania law had been thus narrowed down and only imposed the tax on a certain portion of anthracite coal, based upon the incidents of its ownership, this Court would have sustained the law. The law was sustained because there were certain basic distinctions between anthracite coal and bituminous coal which made the classification proper. Those distinctions had to do with the basic characteristics possessed by the two kinds of coal, and had nothing whatever to do with the incidents of ownership. There was not only a difference in name but a difference in the chemical composition and uses of the two kinds of coal, which gave a basis for the classification. Clearly there is no such distinction in the case at bar. Ore mined under a lease has precisely the same basic characteristics as ore mined by operating fee owners. The only difference between the two is that in the one case the lessee acquired title to the ore by virtue of a lease, and in the other case, the operating fee owner

acquires title by virtue of a deed or other instrument. We, therefore, submit that if the tax is upon ore, or upon ore land, there is no basis whatever, either in reason or in the authorities, for the classification.

(3) *As a tax on income or gross receipts, it is unconstitutional and void.* If this is a tax on income or gross receipts, it is unconstitutional and void, because if we were to admit the power of the Legislature under the Constitution of Minnesota to pass a general income tax law, yet it would have no power to pass a law taxing an isolated and specific source of income, while exempting all others. There is no provision in the Constitution of Minnesota expressly authorizing a tax on incomes. There is a very grave doubt about whether the State would have the power to pass an income tax law in the absence of express constitutional authority. However, if the State of Minnesota has the power to pass an income tax law in the true sense, that is, as distinguished from a tax on business or occupations, it would be bound to make the tax a uniform one under the State Constitution, income as such being the subject of the tax. About fifteen of the states now have income tax laws. In nearly all of them, express constitutional authority exists for the passage of the law. In the case of *Eliasberg Bros. Mercantile Co. v. Grimes, 204 Ala. 492, 11 A. L. R. 302,* the income tax law of that state was held unconstitutional on the ground that it contravened a provision of the Alabama Constitution which prohibited the Legislature from levying in any one year a greater rate of tax than 65/100ths of 1% of the value of the taxable property within the State and the Alabama Income Tax was imposed on property. The Court said:

> "It is interesting to observe that in all of those states, excepting Georgia and Missouri, where a graduated or unequal tax has been laid on incomes, express authority is found therefor in their constitutions, side by side with the general provisions for uniformity or equality. We mention among others Kentucky, Massachusetts, Oklahoma, South Carolina and Wisconsin."

It is to be remembered that we are not dealing with the case of an excise tax upon incomes derived from employments, occupations or exercise of privileges, or whatever might be denominated as a tax on business. We are dealing with the tax, from the standpoint of an income tax, as one laid upon income derived not by virtue of occupation but entirely by virtue of the ownership of property. In the face of such a provision as that contained in the Constitution of the State of Minnesota requiring uniformity, and of the equal protection clause of the Federal Constitution, it would be just as inadmissible to place a discriminatory and arbitrary tax upon a single item of income as it would be to place a discriminatory and arbitrary tax upon the property, real or personal, from which it was derived. The arguments which we have adduced with respect to the uniformity of the tax considered as a tax upon real estate or considered as a tax upon personal property are equally applicable to the tax considered as an income tax.

No state has had the temerity to pass an income tax law which was directed against an isolated source of income while exempting all others. In *Cooley on Taxation, Second Edition, page 28*, the author states:

> "Taxes on incomes may be on all incomes, or on all with such exemptions as will enable the

> taxpayer, in a frugal manner, to support himself and his family."

Defendants in the Trial Court relied on *Shaffer v. Carter, 253 U. S. 37, supra.* We have already commented on that case. The plaintiff owned oil and gas wells in Oklahoma which he operated and from which he derived an income. He was a resident of Chicago, and a tax under the Oklahoma Income Tax Law was imposed on the profit which he derived from this business conducted in Oklahoma. It was a general income tax law and was adopted pursuant to a provision in the Oklahoma Constitution authorizing an income tax. There is, we believe, no doubt about the power of a state, under proper constitutional authority, to pass a general income tax law which will require the payment of an income tax by a non-resident on account of profits derived from a business conducted within the limits of the taxing state. That is all that was involved in the *Shaffer* case, and if anything more is claimed for the decision in that case, it is pure dictum. This Court in the Shaffer case said:

> "And we deem it clear upon principle as well as authority that just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the state, or their occupations carried on therein; enforcing payment so far as it can by the exercise of a just control over persons and property within its borders."

Defendants in the Trial Court also relied on *Atlantic Coast Line Railroad Co. v. Doughton, 262 U. S. 413, 43*

Sup. Ct. Rep. 621. That case involved the validity of the income tax law of North Carolina, which was a general income tax law and was adopted pursuant to a constitutional amendment. Taxpayers, for the purpose of the law, were divided into three classes, namely: individuals, ordinary corporations and public service corporations. The plaintiffs were railroad companies owning and operating lines within the state. The law was held valid. The principal question in the case was whether the law was a burden on interstate commerce, and this Court held it was not. The other question was the validity of the classification, and this Court held the classification valid. But the classification was sustained because it was laid upon the receipts derived from the business of public service corporations and it was pointed out that the differentiation complained of resulted from the difference in the subject of the tax (p. 424).

With respect to the application of the provision of the State Constitution requiring uniformity of taxation upon the same class of subjects, reference may be made to the case of *Parker v. North British and Mercantile Insurance Co., 42 La. Annual 428, 7 So. Rep. 599,* which involved the validity of a law of Louisiana imposing a tax on individuals, corporations, etc., of foreign countries doing insurance business in that state. The tax was to be imposed upon the capital of the insurance company at the place in the State where the company had its principal office but, if the capital was not taxed and paid in any other state, then the tax was levied upon the gross receipts, etc. The Court, in holding the law invalid, among other things said:

"Then the question simply stated is whether a property tax levied on the gross receipts of a limited and particular class of persons and not levied upon the gross receipts of any other class, is valid. The plain constitutional mandate that all property shall be taxed in proportion to its value would seem peremptorily to settle this question. If gross receipts be property subject to taxation, the gross receipts of all or of none must be taxed. It is vain to call gross receipts capital. They are not capital or capital stock, and no legislative declaration can make them so. The only class of taxes under which this can possibly fall is that of an income tax. It is not necessary for us to decide whether or not, under the Constitution, the Legislature has power to levy an income tax. It suffices to say that if the Legislature had such power, it would be an indispensable condition of its exercise that a tax should embrace the income of all persons not exempted; and whatever power of classification the Legislature might possess as to the subject matter of the taxation, that power could, under no pretext, be stretched so as to embrace the right to single out a particular class of taxpayers and to require them to pay such a tax while exempting all others. This is what the Legislature has attempted to do in this instance, and we are bound to hold that it cannot be constitutionally done."

Regarded as an income tax, there is another objection to this law in that it is imposed on all royalties received and not on the portion of them which might be regarded as income. A substantial portion of these royalties is a return of capital because of depletion of the ore deposits. Therefore, if it is claimed that the law

imposes a tax on income, it is invalid in that it is actually imposed on both capital and income. The foregoing authorities establish the rule that even though a State may have the power to pass a general income tax law, yet it would have no power to pass a law imposing a tax on a single source of income or gross receipts while exempting all others. Those cases which sustain the validity of a gross receipts tax for the privilege of doing business and in lieu of other taxes, have no application. They are sustained, first, on the ground that they are imposed upon the exeise or privilege of doing business measured by gross receipts, and, secondly, on the ground that they are in lieu of all other taxes. The tax imposed upon these royalties is not in lieu of all other taxes and is not on the privilege of doing business. If this tax can be sustained, then there is no apparent limit to the power of a state to select the subjects of taxation and to indulge in hostile and unreasonable discrimination.

Furthermore, this Royalty Tax Act was not designed to be, and is not in fact, a tax on income as such. It differs from both the Federal and State Income Tax Laws in many respects. All of the Income Tax Laws, both State and Federal, are general Income Tax Laws, and the tax under them is imposed on all net income with such exemptions and deductions as are reasonable. This law singles out one isolated source of income or gross receipts and imposes the tax on that while exempting all others. Furthermore, both the Federal and State Income Tax Laws impose the tax entirely upon net income and not at all upon capital. This court in *Eisner v. Macomber, 252 U. S. 189* said:

> "Income may be defined as the gain derived from capital, from labor or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets."

This statute does not purport to tax the gain derived from the lessors' interest in these mineral lands. It taxes both the gain, if any, and the capital interest. A large portion of these royalties received by the lessors is depletion or a return of capital. It is true that such royalties have been treated by this court to be rentals under the Excise Tax Law of 1909, but they are rentals only in the sense that they are the price or compensation which the lessee pays the fee owner for the right to remove ore. All of such rent is not necessarily income and certainly not under the present Federal Income Tax Law, or the State Income Tax Law. Under the Federal Income Tax Law the fee owner, who leased his mine prior to March 1, 1913, can deduct from his royalties received a reasonable allowance for depletion, based upon the March 1, 1913 value. This was a recognition by Congress of the fact that a part of such royalties is a return of capital.

Suppose that these plaintiffs, at the time this law was passed, had sold their interest in this mine, subject to the lease, at a valuation which would fairly reflect the then present worth of the future royalties. The proceeds of such sale would be a capital return,—the consideration received for a conveyance of their interest in the mine. None of such proceeds would be taxable under the Royalty Tax Act. Intrinsically such proceeds would be a return of capital in the same sense that these royalties are a return of capital. Suppose

again that at the time this law was passed a mine was under lease and the interest of the lessors, subject to the lease, was sold to third parties for a consideration of $500,000.00, and supposing that thereafter the purchasers received as royalties between the time of the purchase and the exhaustion of the mine $700,000.00: In the case stated, it is quite obvious that the gain to the purchasers would only be $200,000.00 and hence the entire $700,000.00 would not be income. Five hundred thousand dollars of the sum received would be a return of capital, yet the entire amount received as royalties would be taxed under this law, both capital and income. These illustrations might be multiplied and they are persuasive that the law was not designed to be, and is not in fact, an income tax law whether tested by its practical operation or in comparison with other income tax laws. It is, therefore, submitted that as a tax on income or gross receipts, it is unconstitutional and void because (a) it is not a general income tax law; (b) It applies to only one isolated source of income while exempting all others; (c) The imposition of the tax is made to depend not on the characteristics of the income but on the source from which it proceeds; (d) The imposition of the tax is made to depend not on whether gain is derived from the mining or disposal of ore by the owner, but upon whether gain is derived upon the disposal of ore under a lease on a royalty basis; (e) The imposition of the tax is made to depend on the incidents of ownership or form of disposal and not upon the characteristics of the property or proceeds taxed; (f) It is not uniform upon the same class of subjects in that it exempts all income, excepting rents and it exempts all rents, excepting those received as royalties

under a lease of ore lands; (g) The tax is imposed upon capital as well as income and hence is not an income tax and is not uniform; (h) It is a hostile and arbitrary discrimination between sub-classes and persons.

The Act violates the due process clause, and inherent limitations on the power to tax:

The defendants in the trial court contended that the Legislature of Minnesota had full and complete power to enact any tax law within the scope of its imagination, subject only to the limitation that the tax shall be uniform on the same class of subjects. This argument did more credit to the zeal than it did to the calm judgment of the defendants. There are, of course, many limitations upon the power of a state to enact tax laws other than the one that they shall be uniform upon the same class of subjects. There are certain inherent limitations upon the power of the state to pass tax laws such as, (a) that the tax must be for a public purpose and not for a private purpose; (b) that the subject matter of the tax must be within the jurisdiction of the state; (c) that the tax cannot be imposed by arbitrary and oppressive methods; (d) that the tax cannot make unjust and illegal discriminations; (e) that the tax cannot be imposed on Federal agencies. The first four limitations enumerated above might be treated as inherent limitations, or as limitations under the due process clause, but they are none the less limitations on the power of the state to tax. To the extent that the law seeks to impose a tax on property or rights which have no business *situs* within the State, it violates the due process clause. If this is a tax on privilege, then the mere receiving of royalties is not a taxable

privilege and in any event is not a privilege exercised within the State of Minnesota, and a tax sought to be imposed on property beyond the limits of the State, or on privilege exercised beyond the limits of the State, violates the due process clause. In *Looney v. Crane Co. 245 U. S. 183*, the Permit and Franchise Tax Acts of Texas were held invalid by this court on the ground that they taxed property and rights wholly beyond the confines of the State and hence constituted the taking without due process. This court held that the operation and effect of a taxing statute may be such as to render the statute invalid under the due process clause, even though on its face the statute is not repugnant thereto.

The trial court (R. 45) held that the equal protection clause of the Fourteenth Amendment does not prohibit double taxation by the states. Double taxation by the states is not prohibited by the equal protection clause of the Fourteenth Amendment, but it is prohibited by the due process clause of the Fourteenth Amendment and by the general doctrine of inherent limitations upon the power to tax. The tax imposed by this Act is, we believe, double taxation within the meaning of the authorities which hold that such taxation is prohibited. *Cooley on Taxation*, Fourth Edition, page 475, says:

> "Direct duplicate taxation, and by this is meant double taxation in the strict legal sense of the term, means taxing twice for the same purpose in the same year some of the property in the territory in which the tax is laid, without taxing all of it a second time; and such taxation is invariably condemned and without regard to the abstract rules hereafter stated as to the validity of double taxation, has seldom if ever been upheld by the courts in a particular case."

The same author at page 482 says:

> "Moreover, notwithstanding express declarations of some of the courts that double taxation is not illegal unless prohibited by the Constitution, it is doubtful if any court at any time, except in a very few isolated cases, has refused to uphold an attack on a tax as double taxation where the tax is double within the strict meaning of the term, since such a tax would be invalid, it is submitted, if for no other reason, because constituting a taking of property without due process of law.
>
> In fact most of the decisions assume without discussion that doubt taxation, using the term in its strict legal sense, is invalid without reference to any constitutional provisions."

The same author at page 498 says:

> "Where double taxation, strictly speaking, is forbidden, it often occurs that certain instances thereof are so flagrant as to require little or no argument to show their invalidity. For instance, where particular property is assessed as real property, it cannot, of course, be again assessed by the same taxing power as personal property. So the State is not entitled to double taxes on the same land under the same title. So taxation of land with its riparian rights precludes separate taxation of the riparian rights."

The same author at page 500 says:

> "Taxation of the same thing under different names is none the less double taxation."

The foregoing rules are recognized by the Supreme Court of Minnesota. In *State v. Northern Pacific Ry. Co., 130 Minn. 377, 153 N. W. 850,* the court said:

> "Defendant contends that because these services are included in the freight charges of the other railway lines, upon which charges a gross earnings tax is paid, to compel it to pay a tax on these same receipts would be in the nature of double taxation, exacting the commutation taxes on the same property twice. This cannot lawfully be done."

In the above case the court quoted with approval from *State v. Railway Co. 30 Minn. 311, 15 N. W. 307* as follows:

> "Exacting three percentum upon the rent paid the company and also upon the receipts by the tenant earned by operating the railroad, would be to the extent of the rent, in the nature of double taxation or rather of exacting twice the commutation for taxes on the same property."

So it was held in *Shibley v. City of Rome, 107 Ga. 384, 33 S. E. 398,* that a vendor of land cannot be taxed on both the land sold and the proceeds of the sale, whether in cash or notes.

In *Scully v. People, 104 Ill. 349,* it was held that where land is assessed for taxation as such, it is not competent at the same time to assess for separate taxation, rents which are to accrue thereafter from the same land, since rent to grow due is part of the land itself, an incident of it, and would, therefore, be included in the assessment of the land.

Kennard v. City of Manchester, 68 N. H. 61, 36 Atl. 553, it was held that if property was leased and the lessee pays the tax on the property pursuant to agree-

ment, it is obnoxious double taxation to impose a tax on the lessor on a sum which placed at interest would produce an income equal to the annual rent. The only case we can find opposed to this view is *Woodruff v. Oswego Starch Co. 177 N. Y. 23, 68 N. E. 994.* That case cannot be regarded as authority because the validity of the statute and the tax was unnecessary to a decision of the case. The only question involved in the case under the stipulation of counsel was as to whether the plaintiff or the defendant should pay the tax and the stipulation did not raise any question as to the validity of the tax. Land had been conveyed by plaintiffs to defendants, reserving a perpetual rent and with a covenant on the part of defendants to pay certain taxes. The City of Oswego, under a statute empowering it to do so, made an assessment upon the interest of the plaintiffs in the leases as personal estate at a gross valuation. The plaintiffs refused to pay and the tax was collected by the enforced levy and sale of defendants' property. The defendants deducted the taxes so paid from rents falling due and the suit was brought to recover rents due. While the court presumed to pass on the validity of the law, yet it said:

> "I very much doubt that the question of the constitutionality of the law has been raised in this case. The terms of the submission do not seem to present it and the City of Oswego was not made a party."

In so far as this *Woodruff case,* by way of *dictum* or otherwise, holds this New York tax law valid in a suit by the lessor against the lessee to recover rent, it cannot be regarded as authority and the dictum is opposed to the rule laid down in other cases. The court too was

concerned with a statute imposing a tax on all rents reserved in all leases in fee, and not with rents reserved under a particular kind of leases, such as leases of iron ore, and hence the *dictum* does not touch the question of arbitrary discrimination, lack of uniformity, etc., involved in the case at bar.

We submit that the State, having levied an *ad valorem* tax on the ore land, it would be obnoxious double taxation to impose another tax upon the owner of the land on account of the receipt of royalties under a mineral lease. To tax the receipt of the royalties is to tax the property itself. Two taxes are imposed in the same year upon the same property for the same purpose. The vice in the tax consists not alone in the fact that a double tax is imposed on the same property in the same year and for the same purpose, but rather in the fact that one isolated sub-class of property is selected as the object of this tax, while exempting all others. The imposition of the double tax is made to depend not on the characteristics of the sub-class, but on the incidents of ownership or the form of disposal of the property and the receipt of the proceeds. The Mississippi Court said in *Thompson v. McLeod, 112 Miss. 391:*

> "If then you tax the lease itself with an *ad valorem* tax and at the same time exact tribute from the lessee in laying the axe to the tree, it is a case of double taxation pure and simple. There cannot be ownership of standing pine trees without an owner, and if you tax the standing trees with an *ad valorem* tax and at the same time exact tribute from the owner as a condition precedent to his right to lay hands upon the tree, the state is imposing double taxation upon the tree itself."

We, therefore, submit that this Act violates the due process clause and inherent limitations on the power to tax, and is double taxation because (a) the subject matter of the tax is not within the jurisdiction of Minnesota; (b) the Act makes unjust and illegal discriminations between persons and classes; (c) double taxation is prohibited by the due process clause of the Fourteenth Amendment; (d) a double tax is imposed upon the interest of these plaintiffs in this mine in the same year, on the same property and for the same purpose; (e) this double tax is imposed not on all ore land, but only on ore land under lease on a royalty basis; (f) the imposition of the double tax is made to depend not upon the characteristics of the property taxed, but upon the incidents of ownership or the form of disposal and receipt of the proceeds.

CONCLUSION

It is, therefore, respectfully submitted that the trial court erred in dismissing the bill of complaint; that the act assailed in this suit violates the uniformity clause of the Minnesota Constitution and the due process clause, the equal protection clause and the impairment of obligation clause of the Constitution of the United States; that it violates inherent limitations on the power of the state to tax; that the subject on which the tax is laid is vague and indefinite; that taxing statutes should be strictly construed against the state and liberally in favor of the taxpayer; that so-called equitable constructions are not admissible and an otherwise invalid

act cannot be held valid because it is claimed to be complementary or supplementary to another act; that regarded as a tax against the person it is void as to non-residents on jurisdictional grounds; that regarded as an excise tax it is invalid because the receipt of royalties is not a taxable privilege and is not exercised and enjoyed in Minnesota; that the making of a lease in 1899 could not be taxed retroactively in 1924; that regarded as a tax on real estate it is invalid because it is discriminatory and not proper classification in that the class being ore lands, all within the class are not taxed, but only those ore lands under lease on a royalty basis where the mine is being operated or royalties are paid; that the classification made by the Trial Court cannot be sustained because all natural resources being depleted and removed from the state and lost as a source of revenue are not taxed but only certain ore lands under lease on a royalty basis; that regarded as a tax on personal property it is invalid for similar reasons,—as a tax on money or credits the state would have no jurisdiction to tax and as a tax on ore removed it would be arbitrary discrimination and improper classification to tax ore removed under a lease on a royalty basis and to exempt all other ore; that regarded as a tax on income or gross receipts it is discriminatory and void in that it is not a general income tax but singles out one isolated source of income or receipts and taxes it while exempting all others and also taxes both capital and income; that it is double taxation in that a special tax is imposed on ore lands under lease on a royalty basis in addition to general taxes on the land while exempting

all other lands including all other ore lands from the special tax; that the act assailed makes unjust and illegal discriminations and should not be sustained.

All of which is respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1925

No. 390

ROBERT B. WHITESIDE, W. J. CONAN,
ELIZA CONAN, THE SHAWMUT COMPANY,
ROUCHLEAU-RAY IRON LAND COMPANY,
Appellants,

vs.

SAMUEL LORD, J. G. ARMSON AND ODIN HALDEN,
Constituting the Minnesota Tax Commission;
CLIFFORD L. HILTON,
Attorney General of Minnesota;
R. P. CHASE,
Auditor of Minnesota; and
HENRY RINES,
Treasurer of Minnesota,
Appellees.

Appeal from the District Court of the United States
for Minnesota

BRIEF FOR APPELLANTS

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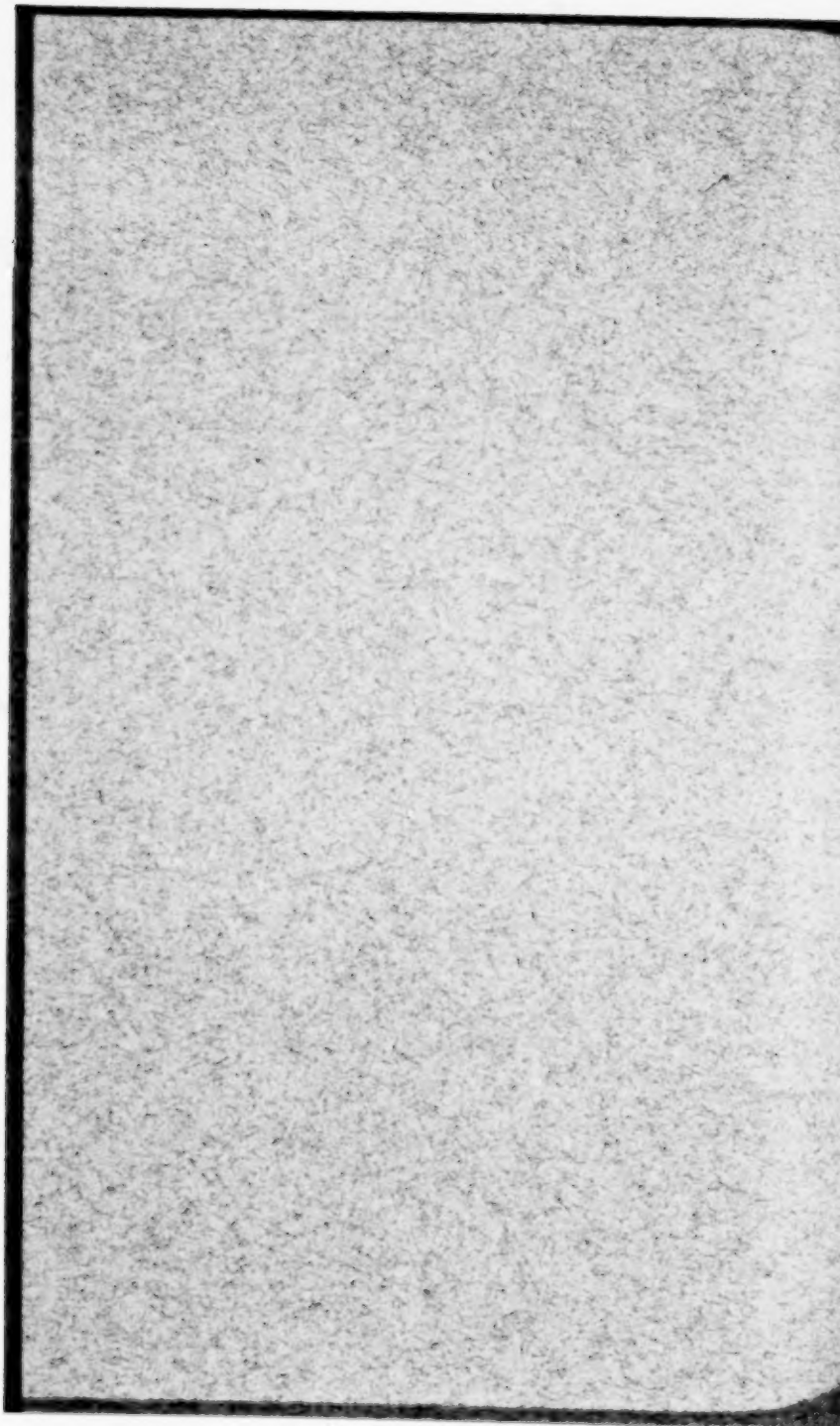

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Appellees.

Appeal from the District Court of the United States
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BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

No offical report of the opinion of the lower court has been published, but the opinion is found in the Transcript of Record, on page 73.

The date of the decree of dismissal to be reviewed is January 15, 1925, and the same is found on page 90 of the record.

The suit was brought to enjoin the enforcement of Chapter 226 of the Laws of Minnesota for the year 1923 upon the ground that the same violates the Fourteenth Amendment to the Constitution of the United States. A decree was entered by the lower court dismissing the bill of complaint on the ground that the statute is constitutional.

In addition, it was conceded on the trial by counsel for the defendants that the lower court had equity jurisdiction (R. 71). The jurisdiction of this court is invoked under Section 238 of the Judicial Code as involving the construction or application of the Constitution of the United States, and being a case in which the Constitution or law of the State is asserted to be in contravention of the Constitution of the United States. The case of *Oliver Iron Mining Company* v. *Lord, et al*, 262 U. S. 172, is believed to sustain the jurisdiction of this court.

THE STATUTE

Chapter 226 of the Laws of 1923 is set out in the appendix. The more important parts of the statute to which frequent reference will be made are as follows:

Sections 1, 2 and 8 of the Act are as follows:

> Sec. 1. **Tax on Iron Ore Royalties—Rate.**— There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this state, a tax of six (6) per cent.
>
> Sec. 2. **Definitions.** For all purposes of this act the word "royalty" shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state for permission to explore, mine, take out and remove ore therefrom; and the word "person" shall be construed to include individuals, co-partnerships, associations, companies and corporations.

Sec. 8. **Tax a Lien On Lands and Ore.** The situs of royalty for all purposes of this act shall be in this state; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore, mine, take out and remove ore on which the royalty is paid.

The other sections for the most part relate to the assessment and collection of the tax.

This tax is not in lieu of, but in addition to, the ad valorem tax imposed on all land in this state, including land leased for the purpose of mining ore (Alleged in paragraph 7 of plaintiff's complaint R. 23 and admitted in paragraph 11 of the answer R. 40. It was agreed that matters alleged in the complaints and admitted in the answers should be deemed proved R. 48).

THE CONSTITUTIONAL PROVISIONS WHICH THE ACT VIOLATES

(1) That part of Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides that "no state shall make or enforce any law which shall abridge the privileges, or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(2) That part of Section 1 of Article 9 of the Constitution of Minnesota which provides that "taxes shall be uniform upon the same class of subjects * * *."

THE CONTENTIONS OF THE PARTIES IN THE LOWER COURT

The Act does not give the tax a name nor designate its subject except as royalty, or royalty received, royalty being defined to mean the amount in money or value of property re-

ceived, etc. The Act does not in terms say whether the tax is intended to be upon persons or upon occupations or upon property; whether it is intended to be a tax upon personal or upon real property; upon money or upon income; upon an occupation; upon a privilege; or upon something else.

The plaintiffs contended that the tax is not uniform upon any class of subjects; that the enforcement of the law would deprive them of the equal protection of the laws; and would deprive them of their property without due process of law.

In the lower court counsel for the State, while declining to say what kind of a tax the Act was intended to impose, or what is the precise subject of the tax, said:

> "Stating the classification so as to include all interpretations of the nature of the tax, as they are expressed by the plaintiffs, the first question is, does a classification which includes only ore; or ore lands; or persons because of their ownership of ore or ore lands; or persons who have, by leasing their lands, effectively arranged for the extraction of their ore; or includes only royalties, or rents, or profits, or gains, from ore lands, violate any of these rules in respect to classification?"

They said further:

> "The question is wholly one of classification. Iron ore is a permissible class of property. Persons engaged in mining iron ore form a permissible class of persons. Certainly it follows that persons who own ore lands, or leasehold interests in ore lands, or who received royalty, rents or gains therefrom, are no more discriminated against, either as persons, or in respect to their receipts or in respect to their property, than either the property owners or the miners were in the Heisler and Oliver cases."

THE DECISION OF THE LOWER COURT

The lower court, in the last sentence preceding the paragraph numbered 1 of the memorandum filed with the order appealed from, said (R. 74):

"The question is whether this court should hold that the classification, royalties, adopted by the Legislature of the State of Minnesota, as a basis of taxation, or for the computation of the tax under Chapter 226, Laws of Minnesota, 1923, is invalid and that the tax levied pursuant thereto is void."

The court sustained the tax and said that it

"might have been laid as an occupation tax, or as an income tax, or as a tax on the land * * *." (Paragraph 11 of Memorandum, R. 80).

The court held that the tax, as actually laid, is a tax upon property, viz: upon an interest in land (Paragraph 11, Memorandum, R. 81).

"Looking through the Act, however, to the real substance thereof, it is essentially a tax upon the interest in the land owned by the person by whom the tax should be paid, and it is so construed in the determination of this case. The amount of the royalty is the basis to be used in the computation of the tax."

The court sustained the tax upon the ground that

"Of necessity, the lands to which the Act applies, in the course of their development, as operating mines, are being and will be depleted in value and ultimately will be lost to the State as a source of substantial revenue. This is the underlying consideration." (Paragraph 6 of Memorandum, R. 78).

THE FACTS

The defendants comprise the Minnesota Tax Commission, the Attorney General, State Auditor, and State Treasurer. The individual plaintiffs are citizens and residents of the State of Minnesota. The other plaintiffs are Minnesota corporations. Each plaintiff owned certain iron ore properties during the year 1923 from which royalties were derived pursuant to the terms of mining leases thereon (R. 49). Said leases were made in

the years 1898, 1902, 1911, 1912 and 1919 respectively. Each lease was for the term of fifty years (R. 53, 54). Exhibit A, appearing on pages 56 to 66 of the printed record, is a fair sample of all the leases in this and other similar actions pending (R. 51).

The royalties under said leases are payable on the 20th day of each January, April, July and October, on account of the minimum requirements and on account of the ore mined during the three preceding calendar months (R. 54).

Under the statutes of the State of Minnesota, all real property is valued for ad valorem taxation purposes and the taxes are assessed as of such value on the first day of May of each year, and likewise all personal property and money and credits are valued and assessed for ad valorem taxes as of the first day of May in each year. Under such statutes, the said fee interests of the plaintiffs in the iron ore in said real estate is valued for taxation purposes at fifty per cent (50%) of its true and full value which is higher than the valuation for taxation purposes of any other class of property whatsoever in the State of Minnesota. The surface of said fee interest is valued for taxation purposes under said statutes at forty per cent (40%) of its true and full value where it is urban property and thirty-three and one-third per cent (33⅓%) where it is not urban property. Under said statutes moneys and credits of the plaintiffs are taxed as are the moneys and credits of all residents and corporations throughout the state at three (3) mills on the dollar of the actual valuation thereof (Alleged in Paragraph 7 of Bill of Complaint, R. 23; admitted in Paragraph VII of Answer, R. 40; and agreed to be deemed proved Paragraph 1 of Agreed Statement of Facts, R. 48; also Paragraph 12, Agreed Statement of Facts, R. 54).

On May 1, 1923, the plaintiff, Robert B. Whiteside, had on hand more than $6,000.00, and The Shawmut Company more than $13,000.00 of royalties received during 1923, all of which

the respective plaintiffs reported for assessment and taxation under the money and credits law of the State of Minnesota and on which they were assessed under said law and were required to pay taxes. That law requires the payment of a tax of three mills on the dollar on all moneys and credits owned by residents of the State of Minnesota on May 1st of any year (Paragraph 12, Agreed Statement of Facts, R. 54).

There were, during the year 1923, at least four instances in which fee owners other than the plaintiffs operated their own properties and sold the ore produced without receiving or paying royalty thereon (R. 55). In the majority of cases where mines are operated, they are operated by lessees who derive the returns or consideration from the ore produced through mining and selling it, and do not receive any returns through royalty paid to them. This was true in 1923 (R. 55).

The iron ore in the lands of the plaintiffs constitutes the chief value thereof, and in the case of iron ore deposits generally, the entire substantial value thereof consists in the iron ore (R. 55).

During the year 1923 the total amount of royalty on iron ore reported to the Minnesota Tax Commission was $16,347,004.22, of which amount approximately $9,538,151.87 was reported as being received by resident owners, excluding from such resident owners foreign corporations; and approximately $1,474,150.58 was reported as being received by corporations foreign to the State of Minnesota; the remainder, approximately $5,334,701.77, being reported as received by non-residents of the State (R. 55).

All the known iron mines of the State of Minnesota are in the northern and northeastern part of the State (R. 55).

Approximately one-half of the mines operated in 1923 were open pit mines, and approximately three-fourths of the ore mined in 1923 was taken from open pit mines. In the usual course of mining from open pit mines, the surface is re-

moved and the ore mined by the use of steam shovels (R. 55).

At various times, two hundred forty-three iron mines have been in operation in the State of Minnesota, of which forty-five have been exhausted (R. 55).

The total tonnage of merchantable ore in Minnesota, according to the figures of the Minnesota Tax Commission in 1923, was approximately 1,300,000,000 tons. During the year 1923 approximately forty mines owned in fee by subsidiary corporations of a certain corporation were held by those corporations free from lease and were not operated. Said mines, according to said Tax Commission's figures, contained 344,000,000 tons of ore. Several of said mines were, prior to the year 1923, operated by an operating company of said parent corporation under arrangements between said operating company and other subsidiary corporations, which arrangements did not, in any instance, involve the payment of any royalty by said operating company to any such owning subsidiary corporation. During 1923 one mine was operated under such arrangements, and it is the present intention of said corporations to continue said practice of operating their said mines under the aforesaid arrangements, not involving the payment of royalty (R. 55, 56).

The total tonnage of merchantable ore in land owned by the State in December, 1922, was approximately 150,000,000 tons. A total of eighty-four state mining leases were then outstanding. In 1923 the State was paid royalties of approximately $1,955,805.40 on ore owned by it, most of the leases being on a twenty-five cent royalty basis. The royalty paid in 1923 represents a tonnage mined on State owned lands of about 5,000,000 tons. About one-tenth of the merchantable ore of the State belongs to the State of Minnesota (R. 70).

Royalty rates in iron mining leases in Minnesota vary from twelve and one-half cents to One Dollar and twenty-five cents per ton (R. 70).

It has been the practice in Minnesota for many years to lease real estate such as business lots in cities on long time leases for rentals payable and paid in cash, and this was true during 1923 (R. 70). Agricultural lands were likewise leased for rentals paid in cash or otherwise (R. 70).

Upwards of four million yards or tons of gravel are used in Minnesota in each year, gravel being found in about half of the localities of the State. The greater part of the gravel pits are leased on a royalty basis, the royalty being from five to twenty-five cents per yard, and usually ten cents per yard. The leases of large gravel pits commonly carry a minimum payment per year. The method of mining is similar to that of mining ore by open pit operations, and this was true in 1923. There are about forty large commercial pits in the State (R. 67). The State itself uses from five hundred thousand to one million tons or yards of gravel per year, about three-fourths of which is leased upon a royalty basis. It holds from fifteen hundred to eighteen hundred leases on a royalty basis. The State is also the lessor in a considerable number of gravel leases (R. 68).

In recent years there were several instances in which iron ore properties not subject to lease were sold, and the fee transferred for a cash consideration. In 1923 there were at least two, and possibly more, instances in which fee owners of iron ore land, which was not subject to lease, sold the same for a cash consideration or its equivalent. In one case, an undivided one-sixteenth interest in fee was purchased by a company which already held a lease on the remaining fifteen-sixteenths interest (R. 56).

SPECIFICATION OF ERRORS URGED

The court erred as to each appellant:

1. In dismissing appellants' bill of complaint and entering a decree for the defendants.

2. In holding that Chapter 226 of the Laws of Minnesota, 1923, does not violate Section 1 of Article 9 of the Constitution of the State of Minnesota, which requires that taxes shall be uniform upon the same class of subjects.

3. In holding that the tax imposed by said Act is not obnoxious to the Fourteenth Amendment to the Constitution of the United States securing to all persons within the State the equal protection of the laws.

4. In holding that the tax does not violate the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law.

5. In holding that the tax is upon land or certain interests therein, and holding that leased ore land may be segregated in a special class and an additional tax levied thereon, when no similar tax is imposed on unleased ore land.

6. In holding that the fact that iron lands are being depleted of their natural wealth furnishes a proper basis for classification under which they may be subjected to special and double taxation.

7. In holding that for the purpose of special taxation it is proper to classify lands according to the form of contract by which they are disposed of or enjoyed.

8. In failing to hold that plaintiffs are entitled to the relief prayed for in their bill of complaint, and in failing to render a decree permanently enjoining the defendants from enforcing the provisions of said Act.

SUMMARY OF ARGUMENT

(The argument is prefaced by a reference to the character of the statute and a brief preliminary discussion of the decisions.)

I

CONSIDERED AS A TAX ON AN INTEREST IN LAND

1. It was not the purpose of the Legislature to impose a new and additional tax upon an interest in land.

2. If, however, the Act is to be considered as one attempting to impose a tax upon an interest in land, it is invalid, because the tax is not imposed upon an interest in all land, nor is it imposed upon an interest in all of any class of land.

(1) The lower court held that the underlying reason for the classification upon which the constitutionality of the Act may be sustained is the circumstance that the ore lands to which it applies are being depleted. It is a fact, however, that other ore lands to which the Act does not apply are being depleted in the same manner. The tax, therefore, is not uniform upon all ore lands that are being depleted.

(2) It is a tax only upon an interest in such lands as are subject to lease permitting the lessee to explore for, or mine ore, and it is imposed upon leased lands yielding royalty, without regard to whether the lands in fact contain ore, and without regard to whether ore is being extracted.

(3) All lands which are leased for the purpose of exploring for, or extracting ore, are subject to this tax and are also subject to the usual ad valorem tax, so that lands leased in this manner are subject to two taxes, while unleased lands are subject to but one tax, unless the tax imposed by Chapter 223 of the Laws of Minnesota, 1921, which this court has held to be an occupation tax, is now to be considered in substance a property tax.

II

CONSIDERED AS A TAX ON MONEY

1. It was the purpose of the Legislature in passing Chapter 226 of the Laws of 1923 to impose a tax upon money.

2. Considered as a tax upon money it is invalid because:

(1) For the purpose of taxation all money is alike. It is incapable of classification.

(2) More specifically, the attempted classification is based upon the source or origin of the money, and no such classification is valid.

(3) The money received as royalty is taxed in a different and more burdensome manner than any other money. All money received as royalty is taxed at least once and part of it is taxed twice. No other money is taxed twice and only that part of all other money which is on hand May 1 in each year is taxed at all.

III

CONSIDERED AS A TAX ON INCOME

1. The law is not an income tax law because:

(1) It does not conform to the common characteristics of all income tax laws.

(2) The tax is more of a tax on capital than on income.

2. If it is intended to be an income tax law, it is invalid because the tax is not uniform upon the entire class, income.

IV

CONSIDERED AS AN OCCUPATION TAX

It is not an occupation tax because the Act contains no language indicating any purpose on the part of the Legislature to impose an occupation tax and the tax has none of the usual incidents of an occupation tax.

V

CONSIDERED AS SOME OTHER FORM OF AN EXCISE TAX

1. The Act contains no language indicating any purpose on the part of the Legislature to impose a privilege tax.

2. Construed as an Act imposing a tax upon the privilege of leasing lands, it is retroactive and the plain terms of the statute forbid the construction that it was intended to impose a tax upon the past transaction of making a lease.

3. A privilege tax is usually imposed upon a privilege which the taxpayer is free to exercise or not. In the case of leases made before the passage of the Act the taxpayer has no such freedom if the tax is upon the privilege of leasing.

4. Even if the tax were in form a privilege tax, it would nevertheless be in substance a tax upon property.

VI

THE HEISLER CASE

The Heisler case has no bearing upon the present case.

VII

CONCLUSION

It was not the purpose of the law to impose any form of excise tax. It was the purpose of the Legislature to impose a property tax. The Act cannot be sustained as one imposing a tax upon property for the reason that it violates the equal protection and uniformity clauses of the Federal and State Constitutions, whether the tax be considered as one upon real estate, upon money, upon income, or upon any other form of property. It does not apply equally to any possible class or any kind of property.

ARGUMENT

(Unless otherwise stated all italics are ours.)

CHARACTER OF STATUTE AND THE DECISIONS

The tax sought to be imposed by Chapter 226 of the Laws of 1923 is unique. So far as we can learn no Legislature ever before attempted to impose a similar tax. The Legislature gave the tax no name, but defined its subject as the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state for permission to explore and mine ore therefrom. This seems to be a tax upon money. The lower court, however, held that the tax is upon an interest in land.

We shall discuss it as a tax on land which the lower court held it to be; as a tax on money, which the Legislature seems to say it is; and also as a tax upon income; as a tax upon an occupation; and as a tax upon a privilege. There is nothing else upon which the tax could be laid.

Whether the law is valid depends upon the validity of the classification adopted by the Legislature. The same rules of classification apply whether the tax be considered as a tax upon land, upon money, upon income or upon an occupation or a privilege.

Although the principles upon which classifications for governmental purposes may be made, have been frequently and fully stated, we desire to cite a very few cases illustrating those relevant to the question under consideration.

Sams v. *St. Louis & M. R. Co.*, 174 Mo. 53, 73.

> "An act of class legislation to stand in the face of the Constitution must include all who belong to the class—not all who bear similarity in some characteristics to those included—but all who cannot be distinguished from them in that particular characteristic which justifies the act. And it must include none who do not belong to the class."

Johnson v. *St. Paul & Duluth Railroad Company*, 43 Minn. 222, 224.

"It has been sometimes loosely stated that special legislation is not class, 'if all persons brought under its influence are treated alike under the same conditions.' *But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought 'within its influence,' but in its classification it must bring within its influence all who are under the same conditions.*"

Truax v. *Corrigan*, 257 U. S. 312, 333.

"Thus the guaranty was intended to secure equality of protection, not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of the equal protection of the laws of the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."

Southern R. R. Co. v. *Green*, 216 U. S. 400, 417.

"While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; * * *."

State ex rel v. *Wagener*, 69 Minn. 206, 208.

"This court has often held that, under these sections, *the legislature must treat alike all who are in the same condition, must make the law apply to a whole class, and cannot make a law which applies only to a part of a class.* And the class must be selected on some distinction, or be defined by some principle, which might naturally or properly distinguish it from all other classes."

Murray v. *Board of County Commissioners,* 81 Minn. at 361.

> A classification "*must be based on some reason suggested by such a difference in the situation and circumstances of the subjects placed in different classes as to disclose the necessity or propriety of different legislation in respect thereto. Any law based upon such classification must embrace all and exclude none, whose condition and wants render such legislation necessary or appropriate to them as a class.*"

Mutual Benefit Insurance Co., v. *County of Martin,* 104 Minn. 179, 183.

The court held that real estate mortgages may be placed in a class by themselves for purposes of taxation. This is partly because it is impracticable to apply to them the ordinary methods of taxation, and partly because the law, in giving the lender of money the right to security and to the safety afforded by the records, gives a benefit which cannot be obtained without the aid of such laws, and the State has the right to tax such a benefit.

The court said:

> "Under this provision (Section 1 of Article 9 of the Constitution of Minnesota) all property belonging to the same class must be treated alike. There must be no discrimination between the subjects of that class. The same means and methods must be applied impartially to all the constituent elements of the class."

State v. *Julow,* 129 Mo., at 177.
The court said:

> "*The legislature* may legislate with regard to a class of persons, but they *cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes* and enact different rules for the government of each."

Counsel for the State, and the lower court, quote general statements from certain opinions of this court. We wish briefly to refer to the cases in which the statements quoted were made.

The case of *Keeney as Administrator* v. *State Comptroller,* 222 U. S. 525, involved the validity of a transfer tax. There was in fact a clear distinction between the transfer taxed and other transfers which were not taxed. Justice Lamar made the remark, at page 536, "*But when there is a difference* it need not be great or conspicuous in order to warrant classification."

In *Citizens Telephone Company* v. *Fuller,* 229 U. S. 322, 331, this court said that the classification adopted by the statute had a reasonable basis resting on a real distinction. It also said, in substance, that while the classification adopted was not exact, "the appellant is not affected by the inexactitude." (Page 332). The appellant was, therefore, not in position to complain. In the course of the opinion, this court made the statement quoted by the lower court.

The statute involved in the case of *Watson* v. *State Comptroller,* 254 U. S. 122, imposed an inheritance tax at a higher rate upon the transfer of personal property which had escaped proper taxation during the life of the deceased than was imposed upon the transfer of property upon which a proper tax had been paid. The court upheld the classification and said, in substance, that no classification could be more reasonable than the one upon which the statute was based, and further said that it is enough if the classification is reasonably founded in "the purpose and policy of taxation."

In the *District of Columbia* v. *Brooke,* 214 U. S. 138, 149, this court said:

> "In the case at bar we are dealing with an exercise of police power, one of the most essential powers, at times the most insistent, and always one of the least limitable of the powers of Government."

The statute there under consideration enjoined a duty alike upon residents and non-residents. The difference between the treatment of residents and non-residents was only in the manner of enforcing the right so enjoined. That different remedies may, and often must, be used as against residents and non-residents, is obvious and according to long established practice.

In the case of *Middleton* v. *Texas Power and Light Company*, 249 U. S. 152, this court was again dealing with an exercise of the police power and, among other things, said, at page 157:

> "There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds."

but added, on page 158:

> "But in this case adequate grounds are easily discerned."

We wish also to refer to one or two other statements which are to be considered with those quoted by the lower court.

In *Boyd* v. *United States*, 116 U. S. 616, 635, Justice Bradley said:

> "It is the duty of the Courts to be watchful for the constitutional rights of the citizens against any stealthy encroachments thereon * * *."

Justice Brewer, in the case of *Gulf, Colorado and Santa Fe Railway* v. *Ellis*, 165 U. S. at 154, quoted the foregoing language and said further:

> *"While good faith and a knowledge of existing conditions on the part of the Legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action."*

and also said:

> "No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation for free government."

All constitutional guaranties in regard to taxation are intended to secure equality and to prevent the Legislature imposing unequal burdens of taxation. Few legislators feel that they have any responsibility as to the constitutionality of a law, or that they are competent to pass upon the question. This is especially true when the voters in the larger part of a State wish to shift the burden of taxation to a small part of the State. Unless the courts see to it that the guaranties of equality and uniformity are enforced, the legislators, in deference to local public opinion, will fritter the guaranties away.

This court recently said, in the case of *Truax* v. *Corrigan*, 257 U. S. 312, 332:

> *"The framers and adopters of this (Fourteenth) Amendment were not content to depend on a mere minimum (of protection) secured by the due process clause, or upon the spirit of equality which might not be insisted upon by local public opinion. They, therefore, embodied that spirit in a specific guaranty."*

Different methods of taxation are, for various reasons, adaptable to different classes of property. It is widely recognized that methods which are practicable in the case of lands and tangible personal property are not practicable in the case of money and intangible property. Different states meet the difficulty in different ways. Minnesota imposes a uniform three mill tax on money, credits, stocks and bonds, while the rate upon tangible property is much higher and varies in the different taxing districts. Massachusetts and New Hampshire, in the exercise of powers permitted by recent amendments to their respective constitutions, impose a tax upon the income from in-

tangible property and exempt the property itself from ad valorem taxes. In Minnesota, in New York, and in a few other states, there are laws under which a mortgagee, at his option, may pay a registration tax upon his mortgage in lieu of all other taxes upon it. In Minnesota and elsewhere railroad companies are subject to a gross earnings tax in lieu of all other taxes upon the property devoted to the transportation business. This tax is held to be a tax upon the property and the gross earnings to furnish a convenient measure of its value. The same method of taxation is applied to telephone, telegraph and express companies. The Supreme Court of Minnesota has said that this method of taxation was resorted to because, as to the property involved. it is not practicable to make an ordinary valuation. *State* v. *Wells-Fargo Company,* 146 Minnesota, at 456. Minnesota, New York, Connecticut, and other states have provided special means of reaching property which has evaded or otherwise escaped the payment of taxes imposed in the usual manner.

With this brief reference to a few of the many cases involving questions of classification and these general observations as to the different methods of taxing different kinds of property, we shall endeavor to discuss the question whether there is any permissible classification upon which this statute can properly be based.

I

CONSIDERED AS A TAX ON AN INTEREST IN LAND

1. It was not the purpose of the Legislature to impose a new and additional tax upon an interest in land.

2. If, however, the Act is to be considered as one attempting to impose a tax upon an interest in land, it is invalid for the reasons stated in "2" below.

1. If the Legislature had intended to impose an additional tax upon land, it would have been easy to make the purpose plain.

The Legislature, by Section 1977 of the General Statutes of Minnesota, 1923, which has been in force for many years, carefully defined real property for the purpose of taxation as follows:

> "Real property, for the purpose of taxation shall be construed to include the land itself, and all buildings, structures, and improvements or other fixtures of whatsoever kind thereon, and all rights and privileges thereto belonging or in any wise appertaining, and all mines, minerals, quarries, fossils, and trees on or under the same."

There is nothing in the 1923 Act to indicate a purpose on the part of the Legislature to disregard or to change this definition.

Mining leases are leases in fact as well as in name, and the royalty payable under them is rent.

State v. *Evans,* 99 Minn. 220;

Boeing v. *Owsley,* 122 Minn. 190;

State v. *Royal Mineral Association,* 132 Minn. 232;

Von Baumbach v. *Sargent Land Co.,* 242 U. S. 503.

Unaccrued rent is real estate. Rent past due is personal property.

State v. *Royal Mineral Association,* supra;

Burden v. *Thayer,* 3 Metcalf 76;

Kennedy v. *Kennedy,* 66 Ill. 190;

Tiffany on Landlord and Tenant, page 1103.

And, more specifically, royalty past due is "an item of money due and payable."

State v. *Royal Mineral Association,* 132 Minn., at page 237.

But it is not unaccrued royalty, nor even royalty due and payable, which is sought to be taxed by this Act. It is royalty

received and that, by the commonly understood meaning of the words, and by the definition of the Act itself, is money received and, therefore, personal property and not an interest in land.

Section 8 of the Act of 1923 declares that the situs of royalty for all purposes of the Act shall be in the State of Minnesota. If the tax is intended to be upon real estate, there can be no occasion for this declaration. The declaration is further evidence that it was the intention of the Legislature to impose the tax upon money, and not upon land.

This will be referred to again in Division II of this brief.

2. The Act, considered as one attempting to impose a tax upon an interest in land, is invalid because the tax is not imposed upon an interest in all land, nor is it imposed upon an interest in all of any class of land. It is a tax upon leased ore lands but not a tax upon unleased ore lands.

(1) The lower court held that the underlying reason for the classification upon which the constitutionality of the Act may be sustained is the circumstance that the ore lands to which it applies are being depleted. It is a fact, however, that other ore lands to which the Act does not apply are being depleted in the same manner. The tax, therefore, is not uniform upon all ore lands that are being depleted.

(2) It is a tax only upon an interest in such lands as are subject to lease permitting the lessee to explore for, or mine ore, and the tax is imposed without regard to whether the lands in fact contain ore, and without regard to whether ore is being extracted.

(3) All lands which are leased for the purpose of exploring for, or extracting ore, are subject to this tax and are also subject to the usual ad valorem tax, so that lands leased in this manner are subject to two taxes, while unleased lands are subject to but one tax, unless the tax imposed by Chapter 223

of the Laws of Minnesota, 1921, which this court has held to be an occupation tax, is now to be considered in substance a property tax.

(1) It is not a tax upon an interest in all land in which the ore is being depleted.

The lower court said that the basis and the underlying consideration for the classification upon which the Act may be supported is:

> "the circumstance or condition that, of necessity, the lands to which the Act applies, in the course of their development, as operating mines, are being and will be depleted in value and ultimately will be lost to the State as a source of substantial revenue. *This is the underlying consideration.*" (Paragraph 6 of the Memorandum, R. 78).

In 1923 there were about 1,300,000,000 tons of merchantable iron ore in the State of Minnesota (R. 55). Of this the subsidiaries of one company owned in fee, not subject to lease, more than 344,000,000 tons. It is the intention of the owners of all that ore to mine it without the payment of royalty (R. 56). Neither that ore nor the land will be subject to the tax imposed by this act. During the year 1923 there were at least four instances in which fee owners operated their properties and sold the ore produced without receiving or paying royalty thereon (R. 55). These properties were being depleted (and the State being deprived of a source of revenue) as much as leased lands were being depleted. In none of those four cases were the ores or the lands subject to this tax. The underlying consideration for the classification upon which the lower court said the Act is based, applies to those four cases, and to the 344,000,000 tons of unleased ore, as well as to the leased ore of the plaintiffs.

If the 1923 Act is the only one to be considered, the lack of uniformity is obvious. It does not operate uniformly upon any class of property based upon the underlying consideration upon which the lower court said the classification may be up-

held, the underlying consideration being the depletion of the ore. The ore from unleased land is being, and will be, depleted, but is entirely free from this Act because it taxes only leased ore land.

The lower court clearly recognized that unleased ore land is being depleted and not taxed by the Act under consideration, but held that it is taxed under Chapter 223, of the laws of 1921, commonly known as the occupation tax law. The court said that

> "as the mining operation and the depletion of the property are usually carried on, there are two classes of persons, or two sets of interests, and no more, concerned therein. They are the operator, who does the mining and the owner whose ore is being mined and the respective interests of each * * *. Although together, the owner and the operator are possessed of the entire interest in the property, their relations thereto are markedly different. So great is that difference that one class, or one set of interests, may be taxed without the other as was done by the Act of 1921 * * *." (Paragraph 9 of the Memorandum, R. 79, 80).

The Act of 1921 to which the lower court referred is Chapter 223 of the laws of that year. It imposed a tax only upon the occupation of mining.

The constitutionality of that Act (except as to one application thereof) was upheld by this court in the case of *Oliver Iron Mining Company* v. *Lord*, et al, 262 U. S. 172. The lower court said that the 1923 Legislature found that *the* 1921 *Act*

> *"on its face, pointed to the fact that one of the interests concerned in the mining industry was thereby subjected to a tax of 6%. It also disclosed the fact that in cases where the mine was leased, the other interest, that represented by the person who received royalties, was not subjected to any such burden. The Legislature found this latter class already carved out by the earlier Act.* * * *. One of these classes, represented by the operator, was specified in Chapter 223 supra and a tax burden by that Act was imposed thereon. The other interest, represented by those

receiving royalty, was specified in Chapter 226 Laws of 1923 and a tax in a different form was imposed on that class. The latter Act was designed to complement the former, which related to the same general subject matter. In the consideration of this case, it is neither possible nor proper to divorce entirely the two Acts which have been referred to." (Paragraph 4 of the Memorandum, R. 77).

The lower court said that the lessor's interest in leased ore land is a "class already carved out." And the lower court said, in paragraph 5 of the Memorandum (R. 78), that "The Federal Constitution does not require that the two classes above referred to should be covered by the same enactment"; and again said, in paragraph 9, that one of these interests or classes is dealt with in the Act of 1921, and that

> "*Although the tax under the Act of* 1921 *is an occupation tax the same is levied because of the operator's relation to the land, and in the last analysis, because of his interest therein.* By the Act of 1923, the entire remaining interest is made the basis for the tax there imposed. In cases *where there is but one ownership, the tax is imposed under the Act of* 1921." (End of Paragraph 9 of Memorandum, R. 80).

That the Federal Constitution does not require the entire field of legislation, nor any two classes of property, to be covered by one act is clear enough. But it seems equally clear that all of any one class must be covered by the same or by simultaneously enacted laws. Otherwise the law, or laws, cannot operate uniformly upon all members of the class and the constitutionality of one statute is dependent upon the enactment, or the repeal, of some other statute. In the remainder of the discussion in this division of the brief, we shall assume that the class, ore lands which are being depleted, might be dealt with in two acts, although we believe the assumption is not correct.

The lower court said that the class of property to be reached consists of the ore lands which are being depleted and which will soon be lost to the State as a source of revenue; that

there are usually two classes of persons or two sets of interests involved in the mining operation; that one of these was taxed by the 1921 Act and the other by the 1923 Act. "Although the tax under the Act of 1921 is an occupation tax, the same is levied because of the operator's relation to the land, and in the last analysis, because of his interest therein. By the Act of 1923, the entire remaining interest is made the basis for the tax there imposed." (Paragraph 9 of Memorandum, R. 80). In paragraph 11 of the Memorandum (R. 81) the court said that the tax under the 1923 Act is "essentially a tax upon the interest in the land owned by the person by whom the tax should be paid and it is so considered in the determination of this case." In substance that is to say that both acts impose taxes upon the land.

The court says the class to be reached consists of the ore lands which are being depleted. There are, however, at least 344,000,000 tons of ore in land which is not subject to lease (R. 55, 56, 70), and so is not subject to the tax imposed by the 1923 Act. That is, at least one-fourth of all the ore in this state is not subject to the tax. Nearly two-fifths of the privately owned ore in the State are not subject to the tax imposed by that Act. This unleased and untaxed ore was being depleted in 1923 and will be depleted just as the leased ore is being and will be depleted (R. 55, 56). Unless some other law taxes the unleased ore, then the class to be reached—the ore lands which are being depleted—is not taxed uniformly. Leased ore which is being depleted is taxed; unleased ore which is being depleted is not taxed. The lower court, however, said that the unleased ore is taxed by the 1921 Act. "In cases where there is but one ownership, the tax is imposed under the Act of 1921." (Last sentence of Paragraph 9 of Memorandum, R. 80).

In order to sustain the decision of the lower court that the tax is valid as a tax upon land, it is necessary to say that the 1921 Act and the 1923 Act may be considered together and that the former, as well as the latter, imposes a tax upon land.

It therefore becomes important to determine whether the tax imposed by the Act of 1921 is a tax upon an interest in land.

Clearly the Legislature did not intend by that Act to impose a tax upon an interest in land. That is just what it wished to avoid. The Act is entitled, "*An act providing for the imposition of a tax upon persons, * * * engaged in the business of mining or producing iron ore* and other ores * * *." The first section provides that "*every person engaged in the business of mining or producing iron ore,* or other ores, in this state, *shall pay* to the State of Minnesota *an occupation tax* * * *."

The appellants in the case of the *Oliver Iron Mining Company* v. *Lord*, et al, 262 U. S. 172, insisted that the 1921 Act imposes a property tax and should be held void because it does not operate uniformly upon any entire class of property. In many forms they insisted that

> "* * * it is, in its essential nature, a property tax." "The tax, by whatever name called, is essentially a tax upon property." "The purpose was to tax the property value in the iron ore, and that is exactly what the Legislature has done in this Act." "We have thus demonstrated * * * that the tax in question is essentially a tax upon property."

Counsel for the State in that case contended that the tax is not a tax upon either the land or the ore which is produced, but a true excise tax upon the business of mining.

This court held that the tax is not a property tax, but an occupation tax, and said:

> "The parties differ about the nature of the tax, the plaintiffs insisting it is a property tax and the defendants that it is an occupation tax * * *. We think the tax in its essence is what the Act calls it,—an occupation tax. *It is not laid on the land containing the ore, nor on the ore after removal,* but on the business of mining the ore * * *. Mining is a well recognized business wherein

> capital and labor are extensively employed. This is particularly true in Minnesota. Obviously a tax laid on those who are engaged in that business and laid on them solely because they are so engaged, as is the case here, is an occupation tax. It does not differ materially from a tax on those who engage in manufacturing * * *."

The basis upon which this court said the tax imposed by the 1921 Act is an occupation tax is that *the tax was laid on those who are engaged in the mining business "solely because they are so engaged."* The lower court, in the present case, however, said that the occupation tax imposed by the 1921 Act is levied, not for the reason stated by this court, but *"because of the operator's relation to the land, and in the last analysis, because of his interest therein,"* and said, in substance, that the unleased ore lands are taxed by the 1921 Act.

The decision of the lower court in this case cannot be sustained unless its view of the 1921 Act is correct. We submit that its view is directly in conflict with the view of this court and with the recent decision of the Supreme Court of Minnesota, in which that Court also held that the 1921 Act imposes an occupation tax. *State* v. *Crete Mining Company*, 204 N. W. 932 (Decided July 17, 1925. Not yet officially reported).

Sometimes legislatures try to circumvent the constitutional guaranties of uniformity and equality as they apply to property taxes by calling a property tax an occupation tax, as in the case of *Dawson* v. *Kentucky Distilleries Company*, 255 U. S. 288, *Thompson* v. *Kreutzer*, 112 Miss. 165; and *Thompson* v. *McLeod*, 112 Miss. 383, 388, elsewhere cited in this brief. The legislatures take such pains because an occupation tax is not a tax upon property, except in the remote sense that all taxes may be said to be taxes upon property because they must be paid with the proceeds of property.

That the tax imposed by the 1921 Act is not a tax upon property was directly held in the case of *Oliver Iron Mining Company* v. *Lord*, et al, supra. It is well settled that neither

an occupation tax, nor any other form of excise tax, is a property tax.

State ex rel v. *Carrel*, 90 Ohio State, 220, 226.

"An occupational tax is in no sense a tax upon property, but is well understood to be a tax on the right to carry on trade, or to transact business."

Ohio Tax Cases, 232 U. S. 576, 593.

"Fifthly, it is contended that the act is in effect a double tax upon property, and hence lacking in the uniformity required by the State Constitution. But, as was pointed out by the District Court, the exaction of 4% of the gross intra state earnings is not a property tax, but an excise tax whose amount is fixed and measured by such earnings; and double taxation in a legal sense does not exist unless the double tax is levied upon the same property within the same jurisdiction. Plaintiffs in error pay a tax with respect to property, another with respect to the privilege or occupation; hence the tax is not double."

This court said, in *Flint* v. *Stone Tracy Company*, 220 U. S. 107, 145:

*"It is, therefore, apparent * * * that the tax is imposed not upon the franchises of the corporation, irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business, and with respect to the carrying on thereof * * *."*

And further, on page 150:

"The act now under consideration does not impose direct taxation upon the property solely because of its ownership, but the tax is within the class which Congress is authorized to lay and collect under Article I, Sec. 8, cl. 1 of the Constitution, and described generally as taxes, duties, imposts, and excises * * *."

To the same effect are: *Savings Society* v. *Coite*, 6 Wall. 594; *Hamilton Company* v. *Massachusetts*, 6 Wall. 632; *Provident Institution* v. *Massachusetts*, 6 Wall. 611.

Eliasberg Brothers Mercantile Company v. *Grimes,* 204 Alabama 492, 495:

> "Practically all courts and textbook writers are agreed that an excise tax, being a tax on business or occupations, however measured, is not a tax on property."

Cooley on Taxation, 4th Edition.

> Section 42: "If a tax is not a property tax or a capitation tax, it is properly classified as an excise tax * * *." Section 45: "An excise tax, using the term in its broad meaning as opposed to a property tax, includes taxes sometimes designated by statute or referred to as privilege taxes, license taxes, occupation taxes, and business taxes." Section 46: "Generally the term 'excise taxes' is used to distinguish such taxes from taxes on property. It is often very important to determine whether a tax is a property tax or an excise tax, i. e., whether (1) a property tax, or (2) an occupation, license, business, privilege, or franchise tax. Not only are excise taxes governed by many rules entirely different from those which control property taxes, but also there are many constitutional provisions applicable to taxes on property, but not to excise taxes. For instance an excise tax is not within constitutional prohibitions such as to requiring taxation of property by value, uniformity and equality of taxation. Such a tax is not objectionable as double taxation, although the property itself is also taxed. * * *."

It has often been held that a tax may be imposed upon the occupation of a merchant and another tax imposed at the same time upon the goods in which he deals, and that this does not constitute unequal taxation. This is because the tax on the occupation is not a tax upon the property dealt in. It was also in this manner that it was held that the corporation excise tax of 1909 was a tax upon the privilege of doing business as a corporation, measured by its income, but was not a tax upon its income.

In view of the clear distinction which exists between an occupation tax and a property tax, *this court having held that*

the tax imposed by the 1921 *Act "is not laid on the land containing the ore, nor on the ore after removal" should not now be asked to hold that it is, nevertheless, in substance a property tax.* That, however, is the basis upon which the lower court placed its decision.

The lower court, not only held that the occupation tax of 1921 is, in substance, a property tax, but assumed that it is valid when applied to one mining ore from his own property. This court, in the case of *Oliver Iron Mining Company* v. *Lord, et al*, expressly refrained from passing upon that feature of the law. This court said (pages 180 and 181) that the question is an important one, and is left entirely open.

If the 1921 Act is invalid as to owners mining ore from their own lands, then ore lands mined by the owners are not taxed even if the occupation tax imposed by the 1921 Act is now called a tax on property.

The lower court's view and the error of that view may be briefly stated as follows:

1. The ore lands which are being mined and depleted and lost to the State as a source of revenue form a proper class.

2. (a) There are usually two subclasses of such lands, those which are leased and those which are not leased. (b) In the case of leased lands there are two interests, that of the lessor and that of the lessee.

3. The 1921 Act was laid as an occupation tax.

4. In substance, however, the 1921 Act, which was laid as an occupation tax, is a tax upon property, viz: upon the lessee's interest in leased land and upon the entire interest in unleased land.

5. The 1921 Act left the lessor's interest in leased land untaxed. The 1923 Act imposed a property tax upon that interest.

6. By means of the two acts, the entire class—ore lands which are being depleted—is taxed.

The lower court thought it immaterial that this result can be reached only by saying that what is in fact an occupation tax is nevertheless in substance a property tax. We have found no case which holds that one part of a class of property can be taxed by a true property tax, and the other part by an occupation tax. On the contrary, the authorities are clear that an occupation tax is not a tax upon property.

The result is that one part of the class to be reached is taxed, while another part and a very large part, is not taxed.

The inequality of the tax is further illustrated by an instance mentioned in Paragraph 22 of the Agreed Statement of Facts (R. 56). No doubt, there are many such cases.

The owner of the undivided one-sixteenth of a parcel of ore land sold it to a company which had a lease upon the other undivided fifteen-sixteenths of the same parcel of land. The vendor paid no tax, other than the money and credits tax, upon the money he received. The purchaser pays no tax on said one-sixteenth, other than the ad valorem tax payable upon all lands. The owner of the fifteen-sixteenths under lease, however, must pay the royalty tax of six per cent imposed by the 1923 Act upon all the royalty he ever receives from the property. He must pay the tax only because his interest in the land is subject to lease. All of the ore in the land belongs to the same class of property, whatever the basis of the classification may be, unless the basis is only the difference between leased land and land not leased.

The one-sixteenth not under lease will necessarily be depleted just as rapidly as the fifteen-sixteenths which are under lease. But it will not be taxed.

(3) It is a tax only upon an interest in such lands as are subject to lease permitting the lessee to explore for and

mine ore, and the tax is imposed without regard to whether the land in fact contains ore, and without regard to whether ore is being removed.

The tax is imposed upon all land on account of the leasing of which royalties are paid, although no ore is being extracted, and even if the land contains no ore. The lease set out in the record contains a provision (R. 60, 61) requiring the lessee to pay the lessor a minimum amount of royalty yearly, without regard to whether ore is mined and without regard to the quantity or quality of iron ore in the land. That lease is a fair sample of all the leases involved (R. 51). If there is no ore in the land, or if none is being mined, the land is not being depleted, and the underlying consideration for the classification, upon which the lower court said the Act is based, fails.

(4) All lands which are leased for the purpose of exploring for, or mining ore are subject to this tax, and are also subject to the usual ad valorem tax levied upon all real estate within the State of Minnesota, so that lands leased in this manner are subject to two taxes, while no unleased land is subject to more than one tax.

If some lands in a class are subject to two taxes, while other lands in the same class are subject to but one tax, the tax is lacking in uniformity, and the owners of the land which is taxed twice are deprived of the equal protection of the laws. *Dawson* v. *Kentucky Distilleries Company*, 255 U. S. 288, 291 (note); *Campbell County* v. *City of Newport*, 174 Ky. 712, 723.

To the same effect is the case of *State* v. *Farmers and Mechanics Bank*, 114 Minn. 95, 113. Section 839 of the Revised Laws of Minnesota for 1905 (Section 2022 General Statutes, 1923) provides that the total deposits and accounts payable of certain banks shall be deducted from the total assets, including personal property appertaining to the business. The surplus, if any, is taxed as a credit. The appellant's office furniture,

having been taken into consideration in determining the surplus, was also separately assessed for taxation, so that the personal property of the appellant was taxed twice, while the personal property of others was taxed but once.

The court held that this was not permissible and said:

> "Since this property had already been taken into consideration in determining the surplus, it could not be separately taxed. Such a course would result in double taxation, which is forbidden by the Constitution, and is not authorized by the statute. * * * Although special reference may not have been made in the opinion to Sec. 1, Article 9, of the State Constitution, the argument and decision were intended to include a consideration of the requirement that taxes must be uniform upon the same class of subjects."

The only prohibition of double taxation is that which is necessarily implied in the constitutional provision that taxes must be uniform upon the same class of subjects.

Assuming that ore lands may properly be taxed in a different manner from other lands due to the fact that the extraction of the ore will soon deprive the State of a source of revenue, there can be no reason for taxing leased ore lands while unleased ore lands are not taxed. The law accords leased ore lands no special privileges. They require no more regulation or supervision by the State and receive no greater protection from it. The law gives the recipients of royalty no unusual right, remedy or security. The ore deposits of the State are no better preserved and are no sooner depleted by a lessee than by an owner mining his own property. Lands, by reason of being leased, contribute no more, nor any less, to the wealth of the State than unleased lands. It seems impossible to suggest, and, so far as we know, no one has suggested, any reason why leased ore lands should be subjected to two taxes while unleased lands are subjected to but one tax. The lower court evidently recognized this difficulty, but held that the unleased ore land is taxed by the occupation tax.

II

CONSIDERED AS A TAX ON MONEY

1. It was the purpose of the Legislature in passing Chapter 226 of the Laws of 1923 to impose a tax upon money.

2. Considered as a tax upon money it is invalid because:

(1) For the purpose of taxation all money is alike. It is incapable of classification.

(2) More specifically, the attempted classification is based upon the source or origin of the money, and no such classification is valid.

(3) The money received as royalty is taxed in a different and more burdensome manner than any other money. All money received as royalty is taxed at least once and part of it is taxed twice. No other money is taxed twice and only that part of all other money which is on hand May 1 in each year is taxed at all (Paragraph 7, Complaint, R. 23; Paragraph VII of Answer, R. 40; also R. 48 and R. 54).

1. The contention that the tax is upon money and not upon real estate was briefly stated in Section 1 of Division II of this brief (pages 20 to 22). What was said there will not be repeated.

The first section of the Act provides that *a tax "shall be levied and collected upon all royalty received during the year * * *."* The second section provides that the word *"royalty," "shall be construed to mean the amount in money or value of property received by any person having any right, title, or interest in or to any tract of land in this State for permission to explore, mine * * *"* etc.

In all the cases now before this court, and in nearly all other cases, the royalty is payable and is paid only in money. In all the cases before the court, the tax is therefore upon money only.

(1) If the tax is upon money, the arbitrary character of the classification is apparent. All money is alike. One dollar has the same value and has the same characteristics as every other dollar. Each dollar gives its owner the same ability to contribute to the revenue of the state as does every other dollar. A dollar received as royalty is no more valuable, gives no more ability to help bear the cost of government, and receives no more protection from the state than any other dollar. This kind of a tax is just as adaptable to money received as interest, or for services, as to money received as royalty. Money received from one source is indistinguishable from money received from any other source.

There are rare instances in which the owner of the land may be entitled to receive, in lieu of money, a part of the ore. If the royalty is received in ore, it is just like other ore. It has the same value as any other ore of like grade. A ton of ore received as royalty is no more valuable, and gives its owner no more ability to bear the cost of government, and requires no more protection than a like ton of ore mined by the owner from his own land.

(2) A classification of money or of ore with reference to its source is arbitrary and capricious.

People ex rel Phillips v. *Raynes*, 120 N. Y. Supplement 1053, is a well considered case in which it was expressly held that a privilege tax, the classification for which is based upon the origin of the goods dealt in, is void. This case was affirmed by the New York Court of Appeals without an opinion, as shown by a memorandum decision reported in 198 N. Y. 539, and a rehearing was denied by the Court of Appeals, 198 N. Y. 622.

The case involved a New York statute which provided that no person should sell convict-made goods without a license. The law was attacked upon the ground that it was an interference with interstate commerce, and that it violated the

equal protection clause of the Fourteenth Amendment. The court said, at page 1057:

> "While the taxing power may be extended to all kinds of persons and property within the state, or may be restricted to certain kinds, * * * it is subject to the one great rule that all persons, under like circumstances, shall be treated in the same way. Persons and property may be classified for taxation, but such classification may not be arbitrary, unreasonable, or capricious. * * * The appellants say that it (the statute) does not conflict with the rule of equality; that it puts into one classification all who deal in convict-made goods, and treats them all alike; and that this is a reasonable classification. Let us see. The classification is based upon the origin of the goods dealt in, without regard to the quality or character or nature of the goods themselves * * * if the purpose of the act, as is claimed, is to protect free labor from prison labor, why in these days of contest between organized and unorganized labor should not an act be passed which provided for such a license for selling goods made in a shop which did not employ union labor, and then, if the advocates of a free shop were in power, repeal it, and provide for such a license for such goods made in shops which employed union labor? * * *"

The court, after discussing various decisions by the New York Court of Appeals, said, at page 1059:

> "A classification by origin applied to a vast variety of goods seems to be more unreasonable than any enumerated by the Court of Appeals. So that, if we should hold that if the statute does not violate the interstate commerce clause of the Federal Constitution and does not, under the guise of a licensing act, practically prohibit the buying and selling within this state of goods, wares, and merchandise produced in another state, and look at it solely as a revenue act, we are forced to the conclusion that it is an unconstitutional exercise of legislative power, and hence invalid."

This case was cited, with apparent approval, in *People* v. *Goldfogle*, 205 N. Y. S., at 876, decided July 15, 1924.

If it is a tax on money, it is the money of those only who own an interest in leased ore lands that is taxed. A classification of money with reference to its receipt by persons having an interest in leased ore lands is wholly illusory.

(3) The money received as royalty is also taxed in a different and in a more burdensome manner than any other money. All the money received as royalty during the entire year is taxed although none of it may be on hand on May 1. In the case of all other money, none that is received during the entire year is taxed unless it is on hand on May 1 (Paragraph 7 of Complaint, R. 23; Paragraph VII of Answer, R. 40; also R. 48 and 54).

If the tax is on money, part of the money taxed is taxed twice, while other money is taxed but once. On May 1, 1923, the day for listing money for taxation, some of the plaintiffs in this case, and in other cases, had on hand large amounts of royalty received by them respectively in 1923, which they reported for taxation and on which they were taxed for that year under the law taxing money and credits (Agreed Statement of Facts, Paragraph 12, R. 54). This money was thus taxed twice in the same year by the same taxing authority, while money received from all other sources was subjected to but one tax. In like manner, if ore or other property is received as royalty, it is likely to be subject to two taxes while other ore is subject to but one tax.

III

CONSIDERED AS A TAX ON INCOME

1. The law is not an income tax law because:

(1) It does not conform to the common characteristics of all income tax laws.

(2) The tax is more of a tax on capital than on income.

2. If it is intended to be an income tax law, it is invalid because the tax is not uniform upon the entire class, income.

Before attempting to say whether this is an income tax law, it seems desirable to ascertain what are the usual or necessary characteristics of an income tax law.

Income is declared by the 1924 Federal Income Tax Law (Sec. 213) to include gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

The Federal Income Tax Act of 1862 imposed a tax upon annual gains, profits or incomes, whether derived from any kind of property, rents, interest, dividends, salaries or from any profession, trade, employment or vocation. The Act of 1864 made the definition even more comprehensive. The Act of 1894 covered practically the same things that are covered by the Acts of 1913, 1916, 1917, 1918, 1921, and 1924.

The English income tax laws which were in force for nearly seventy years prior to the commencement of the Great War, covered a great variety of income, including that from lands, houses, government services, business and professions, mines, gas works, iron works, canals, quarries, markets, foreign securities, coupons, railways out of the United Kingdom, loans secured on rents, and all other interest and all other profits (Seligman, The Income Tax, pages 116 to 220).

The German income tax law covered net receipts "from capital, real estate, trade and industry, and lucrative occupations." (Seligman, page 251).

The French income tax law covered incomes from houses, land, movable capital, business profits, agricultural profits, wages and salaries, professional earnings and all other services (Seligman, page 321).

The Italian income tax law covered all incomes except those from properties subject to the real estate tax and except income from government securities (Seligman, page 341).

The income tax law of the Dominion of Canada contains a definition of income almost as comprehensive as that contained in our Federal Income Tax Act of 1924, and after specifying numerous kinds of income closes with the words: "and also the annual profit or gain from any other source."

At the time of the trial in the lower court there were income tax laws in at least fifteen states and in Hawaii and Porto Rico. In each of these states and in each of these Island Possessions, taxable income included a great variety of forms of income and in the greater number included practically the same forms of income as those covered by the Federal Income Tax Law of 1924.

In each of the federal income tax laws, in the Excise Tax Law of 1909, and in the law of each of the fifteen states, and in Hawaii and Porto Rico, provisions were made for certain deductions, usually of other taxes, expenses and interest paid. In most of them deductions were allowed for depreciation, which must be permitted if the tax is to be confined to income and not burden capital.

In the six most recently enacted Federal income tax laws, and in at least seven of the state laws (those of New York, Oregon, North Carolina, Oklahoma, Wisconsin, Massachusetts, and Missouri), deductions were permitted on account of the depletion of natural resources. (The Oregon law has been held unconstitutional.) In the English income tax laws there was a provision which accomplished the same purpose as the provisions for a deduction on account of depletion.

It is a common characteristic of income tax laws to impose a tax upon practically all forms of income, and to allow all deductions necessary to make the tax as nearly as possible a tax upon net income. (The Arkansas law is an exception. The tax is upon gross income.) It is also a common characteristic of income tax laws that the taxpayer be permitted to recover the entire amount of his investment without liability to tax. Otherwise, the tax is one upon capital as well as upon income. It is also a common characteristic of income tax laws that a deduction of losses be permitted.

In a note to the report of the decision in the case of *Atlantic Coast Line Railroad Company* v. *Daughten*, 262 U. S. 413, 422, it is said:

> "Every income tax act necessarily defines what is included in gross income; what deductions are to be made from the gross to ascertain net income; and what part, if any, of the net income, is exempt from taxation."

If the Act under consideration in this case imposes a tax on income, then it excludes from its operation all the long list of items mentioned in the 1924 Federal Income Tax Law, except rents, and excludes nearly all rents. It excludes even royalties from gravel leases which, considered as income, are in no manner distinguishable from royalties from leases of iron ore. It excludes gains, profits and income derived from salaries, wages, and compensation for personal service, from professions, vocations, trades, businesses, commerce and sales, from dealings in property, from interest, dividends and securities, from the transaction of all business carried on for gain or profit, and excludes gains, profits and income from every source except only rents from leased ore lands. It omits all income arising in any manner out of the ownership or sale of unleased ore lands. It includes and applies solely to the gross rental arising from leased ore lands.

Royalty received from ore lands is included in any idea of gross income, but that is not to say that a law imposing a

tax upon royalty received and upon nothing else is an income tax law, nor to say that the tax is a tax upon income as such. One single member of the very large class of property called income is subject to this tax.

It is not consistent with any ordinary idea of an income tax law to say that this is such a law.

Furthermore, the tax imposed by this Act is levied indiscriminately upon capital and income.

The mining of the ore for which the royalty is paid constantly lessens and ultimately exhausts the value of the property. Royalty paid on account of ore actually mined is necessarily a return of capital at least in part. Usually a large part of it is a return of capital. Sometimes all of it is a return of capital. When the mining operation has been completed, the mine is of no value. In the case of the open pit mine even the surface of the land is removed and its value entirely destroyed. The use of a farm for which rent is paid under a farm lease, or ground for which rent is paid under a ground lease, does not lessen the value of the leased premises. It may increase it. The case of the Merrimac Mining Company now before this court illustrates the point. The Merrimac Mining Company paid $30,000 in cash for a third interest in the fee title to the Meacham Mine, which was then subject to lease. The quantity of ore in the mine had been determined. The purchasers believed that they would get back the purchase price with interest at 6% per annum. But the ore has not been mined so rapidly as was expected and the royalties, therefore, have not been paid so rapidly as expected. It is no longer reasonably certain that the company will get back the $30,000 with interest at 6% (R. 72). The Act of 1923, if valid, will require the company to pay a tax of 6% upon the entire capital invested in the mine as well as upon the profits, if any. This is a case actually before the court. There are, no doubt, many cases in which the investor will fail to get back the principal amount invested.

Nevertheless this Act will impose a tax upon the entire amount received. In such case, the tax will be a tax upon capital and upon nothing else.

Income, of course, constitutes a class of property different from any other class. If the Legislature has the power to impose an income tax, it must be uniform upon the entire class constituting income, unless there is some sound basis for a sub-classification or sub-division of the class. Otherwise, the provision of the Minnesota Constitution which requires taxes to be uniform on the same class of subjects is violated and the taxpayer is deprived of the equal protection of the laws.

The Legislature of the State of Minnesota, by Chapter 532 of the Laws of 1919, proposed to the people an amendment to Section 1 of Article 9 of the Constitution by adding thereto, among other things, the following:

> "Taxes may be imposed on incomes, privileges and occupations which taxes may be graduated and progressive and the exemption of a reasonable amount of income from taxation may be provided, and such taxes may be in lieu of taxes on any class or classes of personal property as the Legislature may determine."

This was apparently in recognition of the fact that under the Constitution as it exists the Legislature has no power to impose a graduated or progressive income tax and no power to make any exemptions. The people rejected the amendment and no such amendment has ever been adopted.

If this is to be considered an income tax law, an entirely novel classification was attempted. So far as we can ascertain, no other legislative body ever attempted to impose an income tax upon one single item of income, leaving all other items free from the tax. Out of the great variety of forms of income, it selected, not a class, but an item.

IV

CONSIDERED AS AN OCCUPATION TAX

The Act contains no language indicating any purpose on the part of the Legislature to impose an occupation tax, and the tax has none of the usual incidents of an occupation tax.

The Legislature was entirely familiar with the language ordinarily used in an act intended to impose an occupation tax, and used such language in Chapter 223 of the Laws of 1921. That act provides:

> "Every person engaged in the business of mining or producing iron ore, or other ore, in this state shall pay to the State of Minnesota an occupation tax * * *."

The language of the Act under consideration is very different. It provides:

> "There shall be levied and collected upon all royalty received * * * a tax * * *."

If the Legislature had intended the tax under consideration to be one upon an occupation, it would naturally have used such language as is usually employed in imposing occupation taxes. This is especially true in a state like Minnesota where, at the time of the adoption of the 1923 Act, there was but one occupation tax.

V

CONSIDERED AS SOME OTHER FORM OF AN EXCISE TAX

There were suggestions in the lower court that the tax might be some other form of excise tax. It was referred to more specifically as a privilege tax.

Appellants contend that the tax was not laid as a privilege tax:

1. The Act contains no language indicating any purpose on the part of the Legislature to impose a privilege tax.

2. Construed as an Act imposing a tax upon the privilege of leasing lands, it is retroactive and the plain terms of the statute forbid the construction that it was intended to impose a tax upon the past transaction of making a lease.

3. A privilege tax is usually imposed upon a privilege which the taxpayer is free to exercise or not. In the case of leases made before the passage of the Act, the taxpayer has no such freedom.

4. Even if the tax were in the form of a privilege tax, it would nevertheless be in substance a tax upon property.

1. There is nothing in the language of the Act to indicate a purpose to impose any variety of an excise tax. There is nothing to indicate that either the "business" or "occupation" or "privilege" of receiving royalty, or the "business" or "occupation" or "privilege" of leasing lands, is to be taxed. Only royalty is taxed, royalty being defined to mean the amount in money or value of property received by a person having an interest in land for permission to explore it, or mine ore.

2. Considered as an Act imposing a tax upon the privilege of leasing lands, it is retroactive in its effect because the evident purpose of the Legislature was to tax royalties received pursuant to leases made prior to the passage of the law as well as those received pursuant to leases made after its passage.

All the leases involved in the cases before the court were made before the passage of the law. One of the leases in this case was made in 1898 (R. 53). In the case of the Merrimac Mining Company, the lease was made by the plaintiff's grantor. In some of the cases, the leases were made by the plaintiff's ancestor. It is very improbable that the Legislature intended to impose a tax upon the privilege of making a lease twenty-five years before the law was passed. It might as well

attempt to impose a tax upon the privilege of occupying land, or farming it, or selling it, twenty-five years before the law was passed. It might as well attempt to impose a tax upon contracts for the sale of stock upon a stock exchange many years before the law was passed. It seems very improbable that the Legislature intended to impose a tax upon a plaintiff on account of a privilege exercised by his grantor or by his ancestor. The New York Court of Appeals, in the case of *People* v. *Trust Company*, 205 N. Y. 74, 77, said that the Legislature cannot impose an excise tax on account of a transaction which at the time it was effected was subject to no tax. It has frequently been held that the Legislature cannot impose a tax upon an inheritance which was vested prior to the enactment of the law. It does not seem necessary, however, to discuss the question of the power of the Legislature. The matter may rest upon the construction of the law. The Supreme Court of Minnesota, in the case of *Builders' etc. Co.* v. *Compensation Insurance Board*, 151 Minn. 427, 430, said:

> "It is thoroughly settled that a statute will not be given a retroactive operation unless it appears 'by express command or by necessary and unavoidable implication' that such was the legislative intent."

This statement was quoted with approval in the case of *State* v. *Crete Mining Co.*, 204 N. W. 932, Supra. That case applies said rule of construction to the occupation tax Act of 1921.

The plain purpose of the Act of 1923 is to tax the money received pursuant to the terms of the leases, not to tax the past transaction of making the leases. It is a property tax, not a privilege tax.

3. A privilege tax is usually imposed upon a privilege which the taxpayer is free to exercise or not. In the case of leases made before the passage of the Act, the taxpayer has no such freedom. He is bound by the contracts entered into long prior to the passage of the law, and, as elsewhere stated, he is

receiving the payments which are due to him under the terms of the contract. He is exercising a property right and not a privilege.

4. Even if the tax were in form upon the receipt of royalty, or upon the privilege of receiving it, or upon the privilege of leasing land, it would, in substance, be a tax upon property. The right to lease land and to receive rent or royalty from it is one of the essential elements of ownership, and a tax on account of an essential element of ownership is a tax on account of ownership, and that, according to all the authorities, is a tax upon the property itself.

Thompson v. *McLeod*, 112 Miss. 383, 387.

The act under consideration in that case was called an annual privilege tax or occupation fee upon all persons pursuing the business of extracting turpentine from standing trees. The complainant was the owner of turpentine distilleries and was engaged in the extraction of gum from trees which he owned or held under lease, and distilling it into turpentine. The court said:

> "* * * It is manifest that the tax enacted by the Act under review operates, and can only operate, as a property tax, and is really not a privilege tax. * * * the privilege, if any, which is taxed, is the privilege or right of the owner or lessee of pine trees to extract turpentine from standing trees. * * * It is true the act in other language refers to it as a business—'a business of extracting turpentine from standing trees.' The imposition of such a tax is not on a business, but on the property involved."

Thompson v. *Kreutzer*, 112 Miss. 165, 167.

The act under consideration was one whereby there was levied an annual privilege tax or occupation fee of twenty cents per acre upon each person owning more than one thousand acres of timber land. The validity of the act was attacked upon

the ground that it was a property tax and that the constitution of the state provided that property shall be taxed in proportion to its value. The Attorney General contended that the tax was upon the privilege of ownership. The court said:

> "Ownership is not a privilege conferred by government, but is one of the rights which governments were organized to protect. * * * In a strictly legal sense, 'property' * * * is synonymous with the 'right of ownership' and means one's exclusive right of possessing, enjoying and disposing of a thing. * * * A tax on a thing is a tax on all its essential attributes, and a tax on an essential attribute is a tax on the thing itself."

These cases were cited with approval in the case of *Dawson* v. *Kentucky Distilleries*, 255 U. S. 288, 294. The tax in that case was said to be upon the occupation of removing whisky from storage in bonded warehouses. This court said:

> "But, as stated by the lower court, 'the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, i. e. consumption, sale or keeping for future consumption or sale. The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it and *to tax the right is to tax the value.' To levy a tax by reason of ownership of property is to tax the property.*"
>
> *Craig* v. *Taylor*, 192 Kentucky 36, 39.

The state court was construing the same statute that was before this court in the Dawson case, and, among other things, said:

> "The mere right to own and hold property cannot be made the subject of excise since the levying of the tax by reason of ownership of property is to tax the property."

It must be equally clear that the mere exercise of the usual rights of ownership, such as leasing or occupying land,

can no more be made the subject of an occupation or other privilege tax than can the ownership itself. To tax the usual and necessary incidents of ownership is to tax the ownership, and that is to tax the property. All such taxes are property taxes.

The matter is briefly stated in 26 R. C. L. Section 209, at page 236:

> "The mere right to own and hold property cannot be made the subject of excise, and since the right to receive income from property is the chief attribute of ownership, the act or privilege of receiving income from property cannot be made the subject of an excise tax."

The provision of Section 8 of the Act, to the effect that the situs of royalty for all purposes of the Act shall be in the State of Minnesota, is a further indication that the Legislature intended the tax to be imposed upon property.

The plaintiffs in the cases now before the court are only receiving payment of obligations due them prior to the adoption of the statute. They are receiving only the consideration for the right to use the land. In all the cases involving this tax now before this court, the right of the fee owner to use the land for the mining of ore was parted with long before the adoption of this statute, and the royalty is only the consideration to which the fee owner is entitled by virtue of the contract made long ago with the lessee. The receipt of payment of an obligation to pay money is an exercise of the right of ownership of the obligation, and any tax upon the right to receive what is due one is a tax upon property. The right to receive royalty payable under contracts made before the adoption of the statute is a property right and not a "privilege." A tax upon the royalty received is as much a tax upon property as is a tax upon money received in the repayment of money loaned. It is as much a tax on property as is a tax upon the right to take one's property out of storage. Such a right may be subjected to a tax which is uniform upon all property of the same kind, but it cannot be made the subject of a privilege tax, as may the right to receive an inheritance.

VI

THE HEISLER CASE

In the lower court counsel for the State relied largely on the case of *Heisler* v. *Thomas Colliery Company*, 260 U. S. 245. The statute there under consideration imposed a tax upon each ton of anthracite coal mined, "washed, or screened, or otherwise prepared for market." It was a personal property tax and nothing else. No similar tax was imposed upon bituminous coal. The statute was attacked upon the ground that there were not sufficient differences between anthracite and bituminous coal to warrant their separate classification. Evidence was offered at the trial, and the trial court found in great detail the many differences between the two kinds of coal. This court discussed the differences and said that they are great and important and are a just basis for their different classification. The differences are inherent in the coals themselves. In the present case there are no differences between the leased ore lands which are taxed and the unleased ore lands which are not taxed. There is no difference between the undivided interest in a parcel of land which is leased and taxed and the undivided interest in the same parcel of land which is not leased and is not taxed. There are not two kinds of property. It is all the same.

VII

CONCLUSION

In conclusion we submit that it clearly appears that it was not the purpose of the law to impose any form of excise tax. It was the purpose of the Legislature to impose a property tax. The Act cannot be sustained as one imposing a tax upon property for the reason that it violates the equal protection and uniformity clauses of the Federal and State Constitutions, whether

the tax be considered as one upon real estate, upon money, upon income, or upon any other form of property. It does not apply equally to any possible class of any kind of property.

The decision of the District Court should be reversed and the relief prayed for by the Appellants should be granted.

Respectfully submitted,

J. W. HUNT,

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Solicitors for Appellant.

APPENDIX

Chapter 226, Laws of Minnesota, 1923

CHAPTER 226—H. F. No. 29

An act providing for the levy and collection of a tax on royalty received by the owner of any right, title or interest in land situate in this state for permission to explore, mine, take out and remove ore from the same.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. **Tax on iron ore royalties—Rate.**—There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this state, a tax of six (6) per cent.

Sec. 2. **Definitions.**—For all purposes of this act the word "royalty" shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state for permission to explore, mine, take out and remove ore therefrom; and the word "person" shall be construed to include individuals, copartnerships, associations, companies and corporations.

Sec. 3. **Annual reports to tax commission.**—Every person to whom royalty is paid shall on or before the first day of February, 1924, and annually thereafter on or before the first day of February of each year, make and file with the Minnesota Tax Commission a report verified by the person making the same and setting forth the amount of royalty received by such person during the preceding calendar year, and such other information as said commission may require.

Sec. 4. **Contents of reports.**—It shall be the duty of every person paying royalty, on or before the first day of February, 1924, and annually thereafter on the first day of February in each year, to make and file with the Minnesota Tax Commission, a report covering the preceding calendar year, verified by the oath of the person making the same and setting forth:

1. The number of tons mined from each tract of land for the right to mine and remove ore on which such person pays royalty.

2. The amount of royalty paid on each tract of land separately.

3. The name and post office address of each person to whom royalty is paid, and

4. Such other information as said commission may require.

Sec. 5. **Tax commission to assess tax.**—Upon the receipt by the Minnesota Tax Commission of the report provided for in Section 3 of this act it shall determine from such information as it may possess or obtain, whether the same is correct or otherwise, and if found correct, said tax commission shall determine therefrom the amount of tax due from such person, and shall enter the amount thereof in its records and shall make its certificate of taxes due thereon from such person, and on or before the first day of May of each year file the same with the state auditor and a duplicate thereof with the state treasurer; and the tax commission shall have power, in case it shall deem said report incorrect, to make its findings as to the amount of such taxes due after hearing upon notice to the person interested, and its findings shall have the same effect as the determination of the amount of such taxes upon a report made as hereinbefore provided.

A person subletting land for the use of which he received royalty shall be required to pay taxes only on the difference between the amount of royalty paid by him and the amount received.

Sec. 6. **Penalties for non-payment.**—If any person subject to the tax provided by this act shall fail to make the report provided for in Section 3 of this act, at the time and in the manner therein provided, there shall accrue upon the tax herein imposed a penalty in an amount equal to ten per cent (10%) of the tax so imposed to be added to and collected with such tax. The tax commission shall in such case determine the amount of the ores mined or produced, together with the royalty paid thereon and shall fix the tax due thereon from such person, together with such penalty, upon such information as it may possess or obtain and shall proceed as provided by law when such taxes are determined upon the sworn report of the person receiving such royalty. Such findings shall stand in the place of the report required by this act to be made by such person and shall be in all courts of the state, for all purposes, prima facie evidence of the facts therein stated.

Sec. 7. **Date of payment.**—Such tax shall be due and payable on the first day of June, 1924, and annually thereafter on the first day of June, and if not paid on or before that date a penalty of ten (10) per cent shall immediately accrue thereon.

Sec. 8. **Tax a lien on lands and ore.**—The situs of royalty for all purposes of this act shall be in this state; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore, mine, take out and remove ore on which the royalty is paid.

Sec. 9. **Auditor to make draft.**—On or before the tenth day of June in each year the state auditor shall make his draft upon each person delinquent in the payment of such tax for the amount of taxes and penalty, or penalties, due thereon, and place the same in the hands of the state treasurer for collection.

The draft of the state auditor for the tax and penalties imposed by the foregoing provisions of this act shall be prima facie evidence in any court where proceedings may be brought for its enforcement that the amount therein stated is due the state from the person against whom the same is drawn.

Sec. 10. **Treasurer to collect tax.**—The state treasurer within ten days after the receipt of the draft mentioned in Section 9 of this act shall notify by mail the taxpayer designated therein of the amount thereof and if not paid within thirty days after presentation shall deliver the same to the attorney general whose duty it shall be to bring an action thereon in the district court of Ramsey County for the amount of such draft, together with interest and costs of the proceedings. Such tax shall draw interest at the rate of one per cent per month, commencing thirty (30) days after the same falls due; and the judgment of the court when so obtained and properly docketed shall be a lien upon all right, title and interest of the taxpayer to the land upon which such tax is a lien from the time the same is docketed; and said lien shall continue without limitation with interest at the rate of one per cent per month and the said property may be sold in satisfaction of such judgment in the same manner as provided by law for the sale of property upon execution.

Sec. 11. **Penalties for false returns.**—Any person who for the purpose of evading the payment of the tax herein provided or any part thereof makes any false return or report shall in addition to the tax provided by this act pay a penalty of fifty (50) per cent of the amount of said tax; and any person who shall knowingly make under oath any false report or return required by this act shall be guilty of perjury and upon conviction thereof shall be punished therefor as provided by law.

Sec. 12. **Records to be open to inspection of tax commission—Violations and penalties.**—All books, waybills, inventories, correspondence and memoranda relating to or used in the transaction of the business of any person paying or receiving royalty on ore mined in this state, shall upon request of the Minnesota Tax Commission be open to its inspection or examination. If any such person shall neglect or refuse on request of the Minnesota Tax Commission access to the papers and books aforesaid, he shall be guilty of a misdemeanor and upon conviction thereof shall be punished therefor as provided by law.

Sec. 13. **Taxes to be paid into general revenue fund.**—All taxes assessed, levied and collected under the provisions of this act shall be paid into the state treasury and credited to the general revenue fund.

Sec. 14. This act shall take effect and be in force from and after its passage.

Approved April 11, 1923.